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No. 92-1115

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PHILIP M. KRUEGER, M.D., - - - Petitioner

versus

BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE, - - - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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QUESTIONS PRESENTED

1. Whether Idaho Code Section 54-1814(7), governing the discipline of physicians licensed to practice medicine in the State of Idaho, is unconstitutionally vague on its face because the Idaho State Board of Medicine has failed to promulgate any rules or regulations to define or explain the statute, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether Idaho Code Section 54-1814(7), governing the discipline of physicians licensed to practice medicine in the State of Idaho, is unconstitutionally vague as applied to the Petitioner because the Board of Professional Discipline of the Idaho State Board of Medicine has failed to promulgate any rules or regulations to define or explain the statute and has, through *ad hoc* adjudication, adopted standards not supported by a consensus of expert opinion, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

3. Whether the Board of Professional Discipline of the Idaho State Board of Medicine's refusal to consider a medical malpractice jury verdict finding the Petitioner's treatment of a patient not to constitute medical malpractice (which treatment was also at issue in the state disciplinary proceeding), before imposing disciplinary action denied the Petitioner an adequate opportunity to be heard and present relevant evidence in his favor, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

All the parties to the proceeding in the Court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court.

TABLE OF CONTENTS

	PAGE
Opinions below	1
Jurisdiction	2
Federal Constitutional Provisions Involved	2– 3
Statement of the Case	3–15
I. How the Federal Questions Were Presented.	3– 5
II. Statement of Facts	5–12
III. Proceedings Below	12–15
Reasons for Granting the Writ	15–27
I. Idaho Code Section 54-1814(7) Is Unconstitutionally Vague on its Face in Violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution	15–19
II. Idaho Code Section 54-1814(7) Is Unconstitutionally Vague as Applied to Petitioner in Violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution	19–24
III. The Board's Refusal to Consider the Medical Malpractice Jury Verdict Exonerating the Petitioner for His Treatment of Patient F Violated Petitioner's Right to Procedural Due Process Under the Fifth and Fourteenth Amendments to the United States Constitution	24–27
Conclusion	28
Appendix	1a–58a

TABLE OF AUTHORITIES

PAGE

Cases:

Baggett v. *Bullitt*, 377 U.S. 360, 84 S.Ct. 1316 (1964) 17

Baldwin v. *Fish and Game Comm. of Montana*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978) 16

Barsky v. *Board of Regents*, 347 U.S. 442, 74 S.Ct. 650 (1954) 16, 17, 27

Carey v. *Quern*, 588 F.2d 230 (7th Cir. 1978) 21

Connally v. *General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926) 17, 18

Czarra v. *Board of Medical Supervisors*, 25 App. DC 443 (1905) 18

Dent v. *West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889) 16

Douglas v. *Noble*, 261 U.S. 165, 43 S.Ct. 303 (1923) 16, 17

Holmes v. *New York City Housing Authority*, 398 F.2d 262 (2nd Cir. 1968) 21

Hornsby v. *Allen*, 326 F.2d 605 (5th Cir. 1964) 21

Jensen v. *Administrator of Federal Aviation 21 Administration*, 641 F.2d 797 (9th Cir. 1981) 20, 21, 22

Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) 17

Lanzetta v. *New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed 888 (1939) 17

Louis K. Liggett Co. v. *Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928) 15

Mathews v. *Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 26

Matlovich v. *Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978) 20

Missouri ex rel. Hurwitz v. *North*, 271 U.S. 40, 46 S.Ct. 384 (1926) 16, 26, 27

Schware v. *Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 77 S.Ct. 752 (1957) 16

United States v. *Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952) 17

White v. *Roughton*, 530 F.2d 750 (7th Cir. 1976) .. 21, 22

PAGE

Judicial Code:
28 U.S.C. Section 1257 2

State Statutes:
Idaho Code Section 9-101 25
Idaho Code Section 54-1814(7) ..... *passim*
Idaho Code Section 67-5210 25

Rules of Evidence:
Idaho Rules of Evidence 401 25
Idaho Rule of Evidence 402 25

Constitution of the United States:
Fifth Amendment ..... *passim*
Fourteenth Amendment ..... *passim*

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PHILIP M. KRUEGER, M.D., - - - - - *Petitioner*

v.

BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE, - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

The Petitioner, PHILIP M. KRUEGER, M.D., respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter on July 8, 1992. The Petition for Rehearing before the Supreme Court of the State of Idaho was denied on September 30, 1992. This Petition is filed within ninety (90) days of the entry of the Order denying the Petition for Rehearing.

OPINIONS BELOW

The Decision and Report of Hearing Officer and Proposed Findings of Fact, Conclusions and Order before the Board of Professional Discipline of the Idaho State Board of Medicine, entered November 30, 1989, is reprinted in

the Appendix to this Petition, at pages 2a through 17a. The Findings of Fact, Conclusions of Law and Final Order of the Board of Professional Discipline of the Idaho State Board of Medicine, entered January 30, 1990, is reprinted in the Appendix to this Petition, at pages 18a through 24a. The Decision on Petition for Judicial Review in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, entered February 27, 1991, is reprinted in the Appendix to this Petition, at pages 25a through 40a. The Decision on the Petitions for Rehearing in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, entered April 25, 1991, is reprinted in the Appendix to this Petition, at pages 41a through 44a. The Opinion and Judgment of the Supreme Court of the State of Idaho, entered July 8, 1992, reported at 836 P.2d 523, is reprinted in the Appendix to this Petition, at pages 45a through 57a. The Order of the Supreme Court of the State of Idaho denying the Petition for Rehearing, entered September 30, 1992, is reprinted in the Appendix to this Petition, at page 58a.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1257.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States:

> **The Fifth Amendment**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws.

STATEMENT OF THE CASE

I. How the Federal Questions Were Presented

The Federal Constitutional questions involved in the within case were first presented in the administrative adjudicatory proceedings before the Board of Professional Discipline of the Idaho State Board of Medicine on a Complaint charging the Petitioner with violating Title 54, Chapter18, Idaho Code, commonly known as the Medical Practice Act, specifically, Idaho Code Section 54-1814(7). Idaho Code Section 54-1814(7) provides for disciplinary action against a medical licensee in the case of:

> The provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public.

Before the Hearing Officer of the Board of Professional Discipline of the Idaho State Board of Medicine, the Petitioner specifically alleged and argued that Idaho Code Sec-

tion 54-1814(7), both facially and as applied to Petitioner, is violative of due process because the ground for discipline set forth therein is too vague to reasonably apprise the Petitioner of what conduct or exercise of medical judgment is acceptable or prohibited under the statute in the absence of rules or regulations promulgated by the Board of Professional Discipline of the Idaho State Board of Medicine defining or explaining the statute, and in the absence of a consensus of expert opinion regarding the conduct and medical judgments at issue.

After the close of the hearing before the Hearing Officer of the Board of Professional Discipline of the Idaho State Board of Medicine, and two (2) weeks before the Hearing Officer rendered his Decision and Report and Proposed Findings of Fact, Conclusions and Order, a jury concluded that the Petitioner met the local standard of care in his treatment of a patient, which treatment was also at issue in the proceedings before the Board of Professional Discipline of the Idaho State Board of Medicine. The jury answered negatively the following interrogatory: "Was the defendant, Philip M. Krueger, negligent, which negligence was a proximate cause of the plaintiff's [name omitted] injuries?". The Petitioner properly and timely moved to supplement the record before the Board of Professional Discipline of the Idaho State Board of Medicine to introduce evidence regarding the jury's exoneration of the Petitioner in the malpractice case. The Board of Professional Discipline of the Idaho State Board of Medicine refused to accept, recognize, or even consider the jury verdict, without any explanation, before imposing its penalty upon the Petitioner based in part upon his medical judgment in the treatment of the patient who was the plaintiff in the malpractice case. On appeal of the decision of the Board of Professional Discipline of the Idaho State Board of Medicine to the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Petitioner specifi-

cally alleged and argued that Idaho Code Section 54-1814(7), which formed the basis for the Board's taking disciplinary action against the Petitioner, is unconstitutionally vague both facially and as applied to the Petitioner, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Furthermore, the Petitioner specifically alleged and argued that the Board's overt failure to accept, recognize, or even consider the jury verdict before imposing its punitive action against his medical license deprived the Petitioner of his right to procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner specifically alleged and argued these same contentions on appeal of the decision of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, to the Supreme Court of the State of Idaho. At each stage of judicial review, Petitioner sought the reversal of the decision of, and penalty imposed by, the Board of Professional Discipline of the Idaho State Board of Medicine.

II. Statement of Facts

The Idaho Medical Practice Act, Title 54, Chapter 118, Idaho Code, and, specifically, Idaho Code Section 54-1814(7), provides the following ground for disciplinary action against physicians licensed to practice medicine in the State of Idaho:

> The provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public.

On November 8, 1988, the Board of Professional Discipline of the Idaho State Board of Medicine filed a Complaint against Petitioner alleging that the following acts or omis-

sions of the Petitioner violated the foregoing provision of the Idaho Medical Practice Act:

(a) On or about March 21, 1988, Respondent delivered a baby boy, Patient D.K., at Respondent's birthing center located at 6565 Emerald, Boise, Idaho. Respondent improperly handled the delivery and subsequent problems following delivery in that Respondent:

1. Failed to transfer the mother to a hospital when meconium was noted;
2. Failed to use an internal scalp monitor to monitor the fetal heart rate during the second stage of labor; and
3. Made medical decisions based upon an inadequate and an unreadable monitor strip.

(b) On or around June 1, 1987, at St. Luke's Regional Medical Center in Boise, Idaho, Respondent performed elective total abdominal hysterectomy and bilateral salpingo oophorectomy on Patient B.M. while Respondent's left arm was immobilized and unusable, and began the surgery before the assisting physician

(c) On or around June 1, 1987, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed an elective exploratory laparatomy, fulgation of endometrial implants, uterine suspension and presacral neurectomy on Patient L.O. while Respondent's left arm was immobilized and unusable, and with a family practitioner assisting.

(d) On or around June 1, 1987, St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed an elective laparotomy and bilateral salpingo oophorectomy on Patient C.S. while Respondent's left arm was immobilized and unusable, and with a family practitioner assisting.

(e) On or about May 30, 1987, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed an elective diagnostic laparoscope and en-

dometrial biopsy on a patient, Chart #118-560, while his arm was immobilized and unusable.

(f) On or around March 28, 1986, at St. Luke's Regional Medical Center, Respondent performed a vaginal delivery of the baby of Patient C.W., utilizing vacuum extraction and a forceps delivery with the baby being born with significant facial and skull fractures and bruising. Respondent's failure to perform a C-Section delivery were inappropriate.

(g) On or around June 17, 1986, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed a C-Section delivery of the baby of Patient C.G. There was an inappropriate delay in performing the C-Section in light of evidence of fetal distress.

(h) On or around April 15, 1986, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed a C-Section delivery of the baby of Patient P.J. There was an inappropriate delay in performing the C-Section in light of evidence of fetal distress.

(i) On or around May, 1988, at his office located at 6565 Emerald, Boise, Idaho, Respondent performed a D and C on a patient with a history of abnormal bleeding. Respondent's failure to obtain a pregnancy test prior to this procedure was inappropriate.[1]

The Complaint was filed against the Petitioner one-and-a-half (1 1/2) years after the most recent of the cases at issue..

An adjudicatory hearing was held before a Hearing Officer of the Board of Professional Discipline of the Idaho

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[1]Throughout this Petition, the treatment of each patient is identified by the capital letter corresponding to the subparagraph letter of the Complaint challenging the Petitioner's treatment of said patient. Because the Supreme Court of the State of Idaho did not rule adversely relative to the Petitioner's treatment of Patients G, H, and I, those subparagraphs of the Complaint are not at issue herein.

State Board of Medicine from June 26 through June 30, 1989. In the course of the hearing, the following evidence was adduced:

As to Patients B, C, D, and E, the Board's expert witnesses, Drs. Colwell, Weyhrich and Jewell, testified that Petitioner violated the standard of care provided in the local community when he performed the four (4) surgeries with one (1) arm immobilized under his surgical gown. However, Dr. Colwell, the Board's own expert witness, testified both in his deposition and at trial that there are no written standards precluding the performing of surgery with one arm immobilized under a surgical gown. (TR. Vol. 2, p. 249)

As to patients B, C, D, and E, the Petitioner's expert witnesses, Drs. Cushman, Fazzio, Montgomery, Talboy, Weitemier, and Bailey, testified that the Petitioner's provision of health care to patients B, C, D, and E conformed to the local community standard of care. Specifically, Dr. Bailey testified that prior to assisting Petitioner in the performance of the surgery upon Patient B, he explained to the patient that he was prepared, if necessary, to be the primary rather than the assistant surgeon. Dr. Bailey also testified that he felt that he and the Petitioner performed the surgery on Patient B as co-surgeons. After the successful completion of the surgery upon Patient B, Dr. Bailey and Petitioner conversed regarding the feasibility of Petitioner also performing two (2) other surgeries later that day. Dr. Bailey told Petitioner that he would have no problem with Petitioner performing other surgeries that day if he had a proper assistant qualified to assist him. Dr. Bailey concluded that the Petitioner's surgery performed upon Patient B on June 1, 1987, met acceptable standards of medical care in the community. (TR. Vol. 1, pps. 108-109; Vol. 7, pps. 1056-58; Vol. 6, p. 897; Vol. 7, pps. 1014-16; Vol. 4, pps. 567-68; Vol. 5, pps. 645-48)

Dr. Weitemier testified that Petitioner's performance of the surgeries in question on Patients B, C, D, and E while his left wrist was in an external fixator device was

excellent and well within acceptable standards of medical care in the community. Dr. Weitemier specifically testified as follows:

> Q. ...Do you have an opinion with reasonable degree of medical certainty as to whether the care he provided in those cases would have fallen within acceptable standards as far as providing care in this community or not?
>
> A. Yes. This would fall within the standard of care for the community in that he had an M.D. first assistant in one case as was required by hospital by-law, and that he had an experienced private scrub nurse for the laparoscopy, which does not require an M.D. assistant by hospital by-law.
>
> Q. Why do you believe that Dr. Krueger's care fell within acceptable standards in this community, knowing that he had operated with the external fixator on his wrist and essentially was not using that left hand in keeping it under his gown.
>
> A. Well, first and foremost, I don't believe that the patients were put in jeopardy.
>
> Secondly, there have been, as you know, other cases in the community where a physician operated with one hand. There have been cases where physicians have operated under a variety of medical problems that they themselves were having without putting the patients in jeopardy.

(TR. Vol. 7, pps. 1014-16)

Dr. Montgomery testified that Petitioner's care as to Patients B, C, D, and E met acceptable standards of medical care in the Boise, Idaho community even though Dr. Montgomery knew that during the surgeries the Petitioner had his wrist in an external fixator brace. Dr. Montgomery also testified that he was aware of other surgical procedures performed by other surgeons in the Boise, Idaho community while the surgeons possessed physical impairments. Specifically, Dr. Montgomery testified that he knew of one

(1) instance where a surgeon performed at least three (3) surgeries with a cast on his arm, that he knew of two (2) instances involving a variety of casts or slings on the arms where the surgeon still performed surgery, and that he personally observed three (3) surgeries which were performed where the primary surgeon had his arm in a cast. (TR. Vol. 7, pps. 1056-58)

Furthermore, the testimony in the administrative hearing revealed that Patients B, C, D, and E each knew of the physical limitation of the Petitioner and consented to the performance of the surgeries despite the presence of such physical limitation. The testimony also clearly illustrated that the Petitioner's assistants (both the assistant surgeon and the scrub nurse) knew of the physical limitation, that the surgical team assembled to perform the surgeries exceeded the community standard as to composition of the surgical team, and that each surgery was performed without undue stress, time, or complication. It was uncontested that each surgery was performed successfully and without incident. Despite the gross lack of a consensus of expert opinion on the issue and the substantial, uncontroverted testimony regarding the performance of other surgeries in the Boise, Idaho community with one (1) arm immobilized, the Board of Professional Discipline of the Idaho State Board of Medicine nevertheless chose, through adjudicatory procedures, to unanimously condemn one-handed surgery *per se* and impose punitive measures against the Petitioner based upon this heretofore unpublished conclusion.

As to Patient A, the Board called two (2) experts, Drs. Colwell and Weyhrich, in an attempt to establish that the Petitioner's standard of care as to Patient A violated the local community standard for Boise, Idaho. Dr. Colwell testified that his primary concern was Petitioner's failing to use an internal fetal heart monitoring device after meconium appeared when the patient's membrane was rup-

tured. Dr. Weyhrich's complaint, however, was that, in his opinion, Patient A should have been transferred from the Petitioner's birthing center to St. Luke's Hospital once the meconium had appeared. Importantly, the Board's own experts disagreed with each other regarding the Petitioner's treatment of Patient A. Specifically, Dr. Colwell disagreed with Dr. Weyhrich as to whether Patient A should have been transported to St. Luke's Hospital after the meconium appeared. Dr. Colwell testified that such immediate transfer would have been risky and that, in his opinion, it was not necessary to transfer the patient to the hospital at that juncture. (TR. Vol. 4, p. 424; TR. Vol. 2, pps. 174-75, 202-05)

Petitioner's expert witness, Dr. Flowers, testified that external fetal heart monitoring alone was perfectly acceptable under recognized published standards of the American College of Obstetrics and Gynecology and met the standard of care in the Boise, Idaho community. Dr. Flowers also concurred in Dr. Colwell's conclusion that Petitioner acted properly in not transferring Patient A to St. Luke's Hospital immediately after meconium was first noted. (TR. Vol. 10, p. 1471)

As to Patient F, the majority of the evidence presented at the administrative hearing focused upon whether the infant's injuries were caused by the normal birthing process or by Petitioner's use of forceps, and whether a cesarean section should have been performed after a failed attempt at vacuum extraction of the infant. The Board's own experts, Drs. Colwell and Weyhrich, testified that, in their opinion, the only criticism they had regarding Petitioner's treatment of Patient F was that he used forceps to deliver the infant without being certain of the position of the infant's head. (TR. Vol. 4, p. 504; Vol. 5, p. 720) Petitioner's expert, Dr. Flowers, stated that it was his opinion that the majority of the infant's injuries were due to the infant's brow presentation during the birthing process. Dr. Flow-

ers also concluded that the Petitioner was correct in attempting a forceps delivery rather than performing a cesarean section on Patient F. Dr. Flowers illustrated the Hobson's choice given to Petitioner of either using forceps when not absolutely sure of the exact position of the infant's head or pushing the infant back up the birth canal to perform a cesarean section. As to these alternatives, Dr. Flowers testified as follows:

> Under no circumstances would I have even thought for a millisecond, considered doing a cesarean section at that point, because to push that baby's head up when it had finally achieved its descent into the pelvis, by going a little bit at a time and then having to readjust, going a little bit at a time, to push that all up at one time would have caused, I believe, irreparable damage to this child. So his only choice was forceps delivery.

(TR. Vol. 10, pps. 1056-58)

Following the hearing, but prior to the Hearing Officer's decision, a civil jury trial was held in a malpractice case regarding Petitioner's treatment of Patient F. The jury specifically found that Petitioner was not negligent and therefore met the local standard of care as to Patient F and her infant child. The Hearing Officer, however, did not have the benefit of considering the jury verdict before rendering his Decision and Report and Proposed Findings of Fact, Conclusions and Order. Although the Petitioner properly and timely moved to supplement the record before the Board to introduce evidence regarding the jury's verdict, the Board refused to accept, recognize, or even consider the jury verdict before rendering its decision and imposing a severe penalty upon the Petitioner.

III. Proceedings Below

The Board of Professional Discipline of the Idaho State Board of Medicine initiated disciplinary proceedings against Petitioner on November 8, 1988, based upon the Complaint filed by the Board. A Hearing Officer appointed by the Board presided at an administrative hearing from June 26

through June 30, 1989. On November 30, 1989, the Hearing Officer issued his Decision and Report and Proposed Findings of Fact, Conclusions and Order. The Hearing Officer concluded that the Board failed to meet its burden of proof in six (6) of the eight (8) cases which formed the basis for the hearing, specifically, Patients B, C, D, E, G, and H. The Hearing Officer also concluded that the statutory ground relied upon by the Board for disciplining the Petitioner, Idaho Code Section 54-1814(7), is facially constitutional, but that specific restrictions were required to be implemented in order to save the statute from being unconstitutionally vague as applied. These restrictions on the Board's application of Idaho Code Section 54-1814(7) were as follows: (1) apply a "clear and convincing evidence" burden of proof to professional discipline proceedings; (2) require as a basis for a disciplinary proceeding that the breach of the standard of care be dangerous to life or health; and (3) apply the limiting "error of judgment" principal to professional disciplinary proceedings. *See,* Decision and Report and Proposed Findings of Fact, Conclusions and Order, Appendix pps. 3a-6a. The Hearing Officer proposed an order concluding that Petitioner failed to meet the appropriate standard of care as to his treatment of Patients A and F, both isolated instances widely separated in time, but that the nature of these violations failed to establish that Petitioner was not competent to continue to practice medicine in the State of Idaho. See, Decision and Report and Proposed Findings of Fact, Conclusions and Order, Appendix pps. 16a-17a.

The Board of Professional Discipline of the Idaho State Board of Medicine, without discussion or explanation, rejected the Hearing Officer's Findings of Fact and Conclusions of Law. More importantly, the Board rejected the Hearing Officer's decision that certain restrictions must be applied to any professional disciplinary proceeding based upon Idaho Code Section 54-1814(7) in order to survive an

unconstitutional-as-applied attack on the ground of vagueness and lack of reasonable notice of standards to be applied to the Petitioner. Finally, the Board concluded that Petitioner violated the appropriate standard of care as to Patients A, B, C, D, E, F, and H and ordered that Petitioner's license to practice medicine in the State of Idaho be revoked. Revocation was stayed upon specific stringent conditions, but the Board reserved the right to lift the stay without a prior hearing at any time within five (5) years. *See,* Board's Findings of Fact, Conclusions of Law and Final Order, Appendix pps. 18a-24a.

The Petitioner appealed the Board's decision to the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada. The District Court held that the Board violated Petitioner's right to procedural due process as to Patient H by considering and deciding allegations which were not raised in the Board's Complaint.[2] The District Court further ruled that Idaho Code Section 54-1814(7) is not unconstitutionally vague on its face and also affirmed the Board's conclusion that Petitioner deviated from acceptable community standards of medical care in his treatment of Patient F. The District Court affirmed the Board's refusal to consider or admit into evidence the jury verdict finding that Petitioner did not breach acceptable community standards of medical care in his treatment of Patient F, concluding that such refusal did not violate Petitioner's right to procedural due process. However, the District Court held that the Board unconstitutionally applied Idaho Code Section 54-1814(7) as to the Petitioner's treatment of Patients A, B, C, D, and E by failing to decide initially whether a consensus of expert opinion exists as to the applicable standard of care before imposing disciplinary action. The District Court remanded those cases to the

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[2]The Supreme Court of the State of Idaho affirmed this aspect of the District Court's Decision.

Board for further consideration. See, Decision on Petition for Judicial Review and Decision on Petitions for Rehearing, Appendix, pps. 25a-40a.

The Board appealed the District Court's decision to the Supreme Court of the State of Idaho, and the Petitioner cross-appealed. The Supreme Court of the State of Idaho reversed the District Court's decision as to Petitioner's treatment of Patients A, B, C, D, and E, and affirmed the District Court's decision as to Patients F and H. The Supreme Court of the State of Idaho concluded that Idaho Code Section 54-1814(7) is not unconstitutionally vague on its face in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments; that Idaho Code Section 54-1814(7), as applied to Petitioner, is not unconstitutionally vague in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments in the absence of a consensus of expert opinion regarding the standard of care to be applied to Petitioner; and that the Board's refusal to consider the jury verdict exonerating the Petitioner as to his treatment of Patient F did not deprive Petitioner of his right to procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution. Opinion and Judgment of the Supreme Court of the State of Idaho, Appendix, pps. 45a-57a.

REASONS FOR GRANTING THE WRIT

I. IDAHO CODE SECTION 54-1814(7) IS UNCONSTITUTIONALLY VAGUE ON ITS FACE IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It has long been established that the pursuit of a lawful occupation is a "property" right within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution. *Louis K. Liggett Co.* v. *Baldridge,* 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928). The practice of medicine carries no less rights than any other calling. Mr.

Justice Stephen J. Field, writing for a unanimous Supreme Court, commented:

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the "estate", acquired in them—that is the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can thus be taken.

Dent v. *West Virginia,* 129 U.S. 114, 122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889).

Thus, the pursuit of a lawful profession is a fundamental property right protected from arbitrary interference from state administrative agencies by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Baldwin* v. *Fish and Game Comm. of Montana,* 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978). Most importantly, well-established precedent holds that professional licenses, including a license to practice medicine, are valuable property rights subject to both the procedural and substantive protections of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Missouri ex. rel. Hurwitz* v. *North,* 271 U.S. 40, 46 S.Ct. 384 (1926); *Douglas* v. *Noble,* 261 U.S. 165, 43 S.Ct. 303 (1923); *Barsky* v. *Board of Regents,* 347 U.S. 442, 74 S.Ct. 650 (1954); *Schware* v. *Board of Bar Exam. of State of N.M.,* 353 U.S. 232, 77 S.Ct. 752 (1957).

In addition to providing procedural protections to holders of professional licenses, the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution contain a substantive component which must be met in order to withstand constitutional scrutiny. In order for a statute providing for suspension or revocation of a medical license to meet the test of substantive due process, the statute must not confer arbitrary discretion upon an administrative agency to withhold or revoke a license, and the statute must not be unconstitutionally vague in its terms. *Douglas* v. *Noble,* 261 U.S. 165, 168 43 S.Ct. 303, 305 (1923); *Barsky* v. *Board of Regents,* 347 U.S. 442, 448, 74 S.Ct. 650, 654 (1954). In determining whether a state statute satisfies this constitutional requirement, this Honorable Court has long held that a statute "forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" is violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Baggett* v. *Bullitt,* 377 U.S. 360, 367, 84 S.Ct. 1316, 1320 (1964); *see also, Connally* v. *General Construction Co.,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Lanzetta* v. *New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952); *United States* v. *Cardiff,* 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952).

In *Connally* v. *General Construction Co.,* 269 U.S. 385, 46 S.Ct. 126 (1926), this Honorable Court invalidated on due process grounds an Oklahoma statute creating a new offense regarding the wages to be paid for persons employed by or on behalf of the State of Oklahoma. The Oklahoma statute in question created an eight (8)-hour day for all persons employed by or on behalf of the state and also provided as follows:

> That not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the state, * * * and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the state, * * * shall be deemed to be employed by or on behalf of the state.

This Honorable Court invalidated the statute, concluding that both the terms "current rate of wages" and "locality" were too vague to withstand constitutional scrutiny. *Connally,* 269 U.S. at 393-395, 46 S.Ct. at 128-129. At least one (1) court has followed the teachings of *Connally* and has interpreted this Honorable Court's due process jurisprudence to hold that a statute providing for the revocation of a physician's license for "unprofessional or dishonorable conduct" is void for vagueness and thus violative of due process because the words so employed had no common or generally accepted meaning, with the result being that what conduct may be of either kind under the statute was a mere matter of subjective opinion. See, *Czarra* v. *Board of Medical Supervisors,* 25 App. DC 443 (1905).

In the present case, Idaho Code Section 54-1814(7) authorizes the revocation of Petitioner's medical license on the ground of "failure to conform to the local community standard" despite the absence of other statutes or regulations specifically defining such terms. The Petitioner had no warning, by statute or by Board rules and regulations, that performing surgery with two (2) qualified assistants while one (1) arm was temporarily immobilized would subject him to disciplinary action. Petitioner had no warning, by statute or Board rules and regulations, that failure to employ an internal monitoring device or immediately transporting a patient after detecting meconium would subject him to disciplinary action. Petitioner had no warn-

ing, by statute or by Board rules and regulations, that using forceps after a failed attempt at vacuum extraction and without an absolutely positive identification of landmarks on the infant's head, when no other acceptable alternative existed, would subject him to disciplinary action. In sum, in the absence of Board rules and regulations providing meaningful guidance as to the statute's terms in this age of constantly-changing medical technology and techniques, the Petitioner and other Idaho medical licensees are at the mercy of the whim and caprice of an administrative body, the composition of which is itself subject to fluctuation and changes in subjective opinion. The statute's vice is its reduction of professional standards to merely the changing subjective opinions of the agency's current members, without any previous notice or warning to those subject to the agency's jurisdiction. The Supreme Court of the State of Idaho erred in holding to the contrary.

II. IDAHO CODE SECTION 54-1814(7) IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO PETITIONER IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Before the Hearing Officer, the District Court for the Fourth Judicial District of the State of Idaho, and the Supreme Court of the State of Idaho, the Petitioner contended that Idaho Code Section 54-1814(7) is unconstitutionally vague as applied to Petitioner because, in the absence of Board rules and regulations or a consensus of expert opinion regarding Petitioner's alleged acts or omissions, the Petitioner lacked reasonable notice of what conduct would subject him to discipline under the statute. The Supreme Court of the State of Idaho construed Idaho Code Section 54-1814(7) as not requiring a consensus of expert opinion regarding Petitioner's alleged acts or omissions, and held that the statute thus construed was not unconstitutionally

vague as applied to Petitioner. Numerous federal precedents regarding individualized, administrative disciplinary and entitlement decisions illustrate that the Idaho Supreme Court's construction of Idaho Code Section 54-1814(7), as applied to Petitioner, renders the statute unconstitutionally vague in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

In *Jensen* v. *Administrator of Federal Aviation Administration*, 641 F.2d 797 (9th Cir. 1981), the United States Court of Appeals for the Ninth Circuit examined the constitutionality of the Federal Aviation Administration's denial of an applicant's medical certificate required for his commercial pilot certificate. After conceding that the federal Alcoholism Act applied to the disqualifying regulations upon which it relied in denying the applicant's certificate, the FAA argued that the applicant could have applied for, but did not apply for, an exemption from the disqualifying regulations under its "two-tiered" system of review. The regulation upon which the FAA relied for its authority to grant an exemption from its "automatic disqualification" rule provided that the FAA Administrator may grant an exemption from any FAA rule or regulation if he decides that to do so would be "in the public interest" and "would not adversely affect safety." 14 C.F.R. Section 11.27(e) (1980). The Ninth Circuit held that, even assuming the FAA's "two-tiered" review argument were valid, such a scheme was violative of due process. Wrote the court:

> Due process requires that for a meaningful review of an agency decision, the agency must have articulated standards governing its determinations. See *Matlovich* v. *Secretary of the Air Force*, 591 F.2d 852, 857 n. 11 (D.C. Cir. 1978).
>
> Here, the FAA's only standards for an exemption are that it would be "in the public interest" and "would not adversely affect safety." These standards do not

> give the court a sufficient basis for review. Neither do they give the applicant any basis for "planning his course of action (including the seeking of judicial review)." *Id.* at 857.
>
> *Jensen,* 641 F.2d at 799.

Similarly, in *White* v. *Roughton,* 530 F.2d 750 (7th Cir. 1976), the Seventh Circuit examined the constitutionality of the administration of a general township assistance program and held that the program, as applied to the plaintiffs, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. At the hearing in the district court, the defendant who administered the program admitted that he and his staff determined eligibility based purely upon their own unwritten standards. The Seventh Circuit held that such a procedure, "vesting virtually unfettered discretion in [the administrator] and his staff, is clearly violative of due process," and that "[f]air and consistent application of [the eligibility] requirements requires that [the administrator] establish written standards and regulations." *White,* 530 F.2d at 754. Other federal decisions are in accord with the holdings in *Jensen* and *White. See, e.g., Carey* v. *Quern,* 588 F.2d 230 (7th Cir. 1978) (due process was violated where there was no system of informing claimants of their right to clothing allowance and there were no administrative guidelines governing eligibility determinations for the "as needed" program); *Holmes* v. *New York City Housing Authority,* 398 F.2d 262 (2nd Cir. 1968) (due process requires that selections among applicants for public housing be made by city housing authority with ascertainable standards); *Hornsby* v. *Allen,* 326 F.2d 605 (5th Cir. 1964) (due process requires adoption of reasonable rules and regulations establishing standards for granting or denying liquor licenses.)

In the present case, the Board of Professional Discipline of the Idaho State Board of Medicine did nothing less than engage in an *ad hoc* rulemaking to promulgate its

subjective interpretation of Idaho Code Section 54-1814(7) at the Petitioner's expense, without any advance notice or warning of such standards being given to Petitioner. Essentially, the Board unconstitutionally accomplished through *post hoc* individualized adjudication what the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution require to be accomplished through either rulemaking or other advance promulgation of standards. As in *White*, where the lack of written standards was constitutionally fatal, here it was uncontested that there were no written rules or standards even addressing, let alone prohibiting, Petitioner's performance of surgeries with two (2) qualified assistants while one (1) of his arms was immobilized. Indeed, numerous expert witnesses testified that such surgeries had been performed in the past without any disciplinary or corrective action whatsoever being taken. The Board simply singled out Petitioner in order to promulgate its new "unanimous" rule, *ex post facto*. As in *Jensen*, the Petitioner herein had absolutely no basis for planning his course of action, especially in light of the known past practices of other temporarily physically impaired surgeons in the Boise, Idaho community. By rejecting the District Court's requirement that a "consensus of expert opinion" be required in order to save Idaho Code Section 54-1814(7) from as-applied infirmity under the Due Process Clauses of the Fifth and Fourteenth Amendments, the Supreme Court of Idaho's interpretation of the statute has rendered the statute unconstitutional as applied. Because it is uncontested that no rules or regulations explaining Idaho Code Section 54-1814(7) have been promulgated by the Board, only a consensus of expert opinion is sufficient to give notice to Petitioner of what conduct is required or prohibited. Only this requirement can enable the disciplinary standard to withstand a vague as-applied due process attack.

As to the Petitioner's treatment of Patient A, the Board's experts themselves were in serious conflict as to their opinions regarding the treatment given to the patient, displaying a studied vagueness as to exactly what was expected of Petitioner, even with the benefit of hindsight! As to Patient F, Petitioner's expert testified that Petitioner was basically given an obstetrical Hobson's choice in the delivery of the patient's infant, and also testified that Petitioner exercised his best acceptable medical judgment in the choice he made. Basically, the Board rendered a *post hoc* judgment on the Petitioner's care of his obstetrical patients and chose the unconstitutional route of "rulemaking through individual adjudication" in order to achieve its ends.[3] The Su-

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[3]Indeed, one of the Board's expert witnesses so much as acknowledged the division of opinion and the competing OB/GYN factions or schools of thought within the Boise, Idaho medical community. On cross-examination in the administrative hearing, Dr. Colwell testified as follows:

> Q: Doctor, you got involved in this case because you were concerned that something needed to be cleared up in this town; because there was some division between several of the obstetrician/gynecologists here, including Dr. Barton, who had expressed some feelings about Dr. Krueger and his style of practicing obstetrics. Do you recall that?
>
> A. I recall the conversation that we had in the time of the deposition. But you're referring to, I think, two separate statements that I made. You're putting two separate statements together.
>
> Q. Yes. Would you like to separate them to clarify?
>
> A. I would.
>
> Q. Please.
>
> A. I was asked by the Board to render an opinion as to what maybe should be done next. That's one. I didn't volunteer any information on my own, saying this had to be cleared up.

(Footnote continued on next page)

preme Court of the State of Idaho's approval of such patently arbitrary action is manifest error which cannot withstand due process scrutiny.

III. THE BOARD'S REFUSAL TO CONSIDER THE MEDICAL MALPRACTICE JURY VERDICT EXONERATING THE PETITIONER FOR HIS TREATMENT OF PATIENT F VIOLATED PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Two (2) weeks before the Hearing Officer submitted his Proposed Findings and Conclusions to the Board, but before the Board rendered a decision in the matter, a jury in a malpractice action concluded that Petitioner was not liable for malpractice in his treatment of Patient F or her infant. The jury was specifically asked: "Was the defendant, Philip M. Krueger, negligent, which negligence was a proximate cause of the plaintiff's [name omitted] injuries?" The jury answered: "No". The Petitioner moved the Board to receive and consider the verdict as evidence in its evaluation

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(Footnote continued from preceding page)

> Q. You recommended to them that something needed to be done to clear this thing up between Dr. Krueger on the state level and some of the physicians in this community, isn't that true?
>
> A. I was asked by the Board to render an opinion as to that, yes; which I did.
>
> Q. And you said the problems were a hardship on Dr. Krueger and the physicians involved, as you saw it, and you wanted to help clear it up; isn't that correct?
>
> • • •
>
> A. That's what I recall, yes.
>
> Q. (By Mr. Firestone) You had indicated that there was a lot of rankling and bitterness that needed to be settled here; is that correct?
>
> A. That's what I recall.

(TR. Vol. 5, pps. 779-780)

of Petitioner's treatment of Patient F pursuant to Idaho Code Section 67-5210, which provides, *inter alia:*

> *Rules of evidence—Official notice*—In contested cases: (1) irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in non-jury civil cases in the district courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by prudent men in the conduct of their affairs....
>
> * * *
>
> (4) Notice may be taken of judicially cognizable facts....

Under Idaho law, both public and private acts of the judiciary may be noticed, Idaho Code Section 9-101, and evidence is deemed relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of a case more probable or less probable than it would without the evidence. I.R.E. 401, 402.

Before the Supreme Court of Idaho, the Board argued that the ground for disciplinary action set forth in Idaho Code Section 54-1814(7) is not void for vagueness, either facially or as applied to Petitioner, because the statute purportedly codified well-established concepts of medical malpractice sufficient to inform Petitioner of what conduct was required of him under the disciplinary scheme of the Idaho Medical Practice Act. The Idaho Supreme Court not only accepted this argument, but also concluded that the proffered jury verdict in the malpractice case was not relevant to the disciplinary proceedings and that Petitioner's procedural due process rights were not violated as a result of the Board's refusal to consider the verdict before penal-

izing the Petitioner.[4] Such is not only internally inconsistent and violative of common sense, but also flies in the face of well-established procedural due process principles.

In the seminal case of *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), this Honorable Court set forth the balancing test for determining what process is due before an administrative agency may revoke a right or entitlement as follows:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally require consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural safeguards would entail.

This Court concluded that "[t]he essence of due process is the requirement that 'a person put in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it", [citation omitted] in order "to insure that they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 348-349, 96 S.Ct. at 909.

In *State of Missouri ex rel. Hurwitz* v. *North*, 271 U.S. 40, 46 S.Ct. 384 (1926), this Honorable Court examined a due process challenge to a Missouri statute relating to the

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[4]The jury's verdict exonerating Petitioner from any liability in his treatment of Patient F and her infant also underscores the validity of Petitioner's contention that Idaho Code Section 54-1814(7), as applied to Petitioner, is void for vagueness and thus violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

revocation of medical licenses by the Missouri Board of Health. The challenge was based upon the fact that the statute in issue did not authorize the Missouri Board to issue subpoenas in license revocation proceedings. This Honorable Court rejected the challenge but did so on the salient ground that the statute **did** provide the physician with a reasonable opportunity to present his defense because the taking of depositions was authorized by the statute and the officers taking the depositions could compel the attendance of witnesses.

The present case is *Hurwitz* turned on its head. The Petitioner sought merely to introduce a jury verdict which was obviously relevant to his defense of the Board's allegations relative to Patient F. The jury verdict was an integral part of Petitioner's case. Indeed, the jury verdict in the malpractice case went to the very heart of the standards which the Board itself espoused in defending its evaluation of the Petitioner's conduct. The probable value of the verdict was thus substantial under the second prong of *Mathews*. Furthermore, the Board could have admitted and considered the jury verdict with absolutely no administrative inconvenience or expense under the third prong of the *Mathews* balancing test. Finally, the private interest at stake, the Petitioner's livelihood, was substantial. See, *Barsky* v. *Board of Regents,* 347 U.S. 442, 459, 74 S.Ct. 650, 659 (1954) (Black, J., dissenting) (the right to practice medicine "may mean more than any property"). The Board's arbitrary refusal to receive, admit, or even consider the jury verdict deprived Petitioner of a meaningful opportunity to present his defense to serious charges, and such refusal is repugnant to the well-established principles and purposes of the procedural protections guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the Opinion and Judgment of the Supreme Court of the State of Idaho.

Respectfully submitted,

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APPENDIX

CONTENTS OF APPENDIX

	PAGE
Decision and Report of Hearing Officer and Proposed Findings of Fact, Conclusions and Order	2a–17a
Findings of Fact, Conclusions of Law and Final Order of the Board of Professional Discipline of the Idaho State Board of Medicine	18a–24a
Decision on Petition for Judicial Review in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada	25a–40a
Decision on Petitions for Rehearing in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada	41a–44a
Opinion and Judgment of the Supreme Court of the State of Idaho	45a–57a
Order of the Supreme Court of the State of Idaho Denying Petition for Rehearing	58a

Case No. 88-043

BEFORE THE BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE

In the Matter of

PHILIP M. KRUEGER, M.D.,
License No. M-3549,
Respondent.

DECISION AND REPORT OF HEARING OFFICER AND PROPOSED FINDINGS OF FACT, CONCLUSIONS AND ORDER

In this matter the Hearing Officer having received and considered the evidence presented by the parties and closing arguments of counsel in the form of briefs on the evidence and the law, the parties having waived oral closing arguments, hereby makes his Decision and Report to the Board and his proposed findings of fact, conclusions and order, pursuant to Rule 13 of the Board's Rules of Practice and Procedure in Contested Cases (IDAPA 22.G., hereafter "Rules").

ISSUES OF LAW

Certain issues of law have been raised and preserved by the parties in the course of these proceeding which need to be addressed at the outset since their determination will have a bearing on and control the proposed findings of fact, conclusions and order.

Controlling Effect of Pleadings.

Rule 22.G.8.c. requires that pleadings "shall set forth a clear and concise statement of the matters relied upon as a basis for such pleading. . .".

> Rule 28.G.8.f. requires the complaint to "set forth a short and plain statement of the ground of complaint and a statement of the facts or things done or omitted to be done by such persons [Respondents]. Facts constituting such acts or omissions, together with citations, statutes, or rules of the Board involved, should be stated, together with the dates on which the acts or omissions occurred."

The necessary implication from the Rules, as well as the requirements of due process, is that the complainant is limited to the alleged grounds for discipline set out in the complaint. For this reason, the findings and conclusions will only address issues raised by specific allegations of the complaint.

Constitutionality of Statutory Ground for Discipline Relied upon by Complainant.

The complaint alleges several instances of alleged violations of Idaho Code 54-1814(7). This statutory ground for discipline, which is the only one relied upon by the Complainant, provides for discipline in the case of:

> "The provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public.

From the outset Respondent has challenged the validity of this ground for discipline as being too vague to meet the requirements of due process under the standards enunciated by the Idaho Supreme Court in the cases of *H & V Engineering* v. *Bd. of Pro. Engineers,* 113 Idaho 646, 747 P.2d 55 (1988); and *Tuma* v. *Board of Nursing,* 100 Idaho 74, 593 P.2d 711 (1979).

From my review of those two cases and similar cases in other jurisdictions I have concluded that the standard in question is facially valid. Cases collated in Annotation, *Professional Incompetency as Ground for Disciplinary Measure against Physician or Dentist,* 28 ALR3d 487. Of significance to this determination is the fact that physicians and surgeons have been held to the same standard to avoid liability for medical malpractice both by statute and longstanding case law. I.C. 6-1012; *LePelley* v. *Grefenson,* 101 Idaho 422, 614 P.2d 962 (1980).

Burden of Proof

Since I have concluded that I.C. 54-1814(7) is facially valid, the real issue is whether the specific conduct charged against Respondent violated the statutory standard. The quantum and quality of evidence required to meet the Complainant's burden of proof in this regard will control that determination and thus is an issue of some significance to this proceeding.

As already noted, an almost identical standard to that provided by I.C. 54-1814(7) is used as a basis for medical malpractice actions. Theoretically, this could mean that every physician or surgeon who is found liable for medical malpractice is subject to disciplinary action. While this may not be inappropriate, there is nothing in the Rules or the record to indicate that this is an established practice. Whether or not it is an established practice, the theoretical possibility which exists presents a basis for serious inconsistency. It is clear from the case law that the burden of proof on the plaintiff in a medical malpractice action is a preponderance of the evidence. However, it seems incongruous to allow a physician to be deprived of the right to practice his chosen profession based upon the same quantum and quality of evidence required to subject him to payment of damages for medical malpractice. It is true that both constitute a deprivation of property; however, the one constitutes a temporary loss which can be covered by insurance or recouped while the other is irreplaceable

and arguably should require a higher burden of proof. The incongruity is exacerbated when it is observed that facially a physician can be subjected to discipline and loss of his license under I.C. 54-1814(7) without any proof that his violation of the standard of care caused injury or death. On the other hand, he cannot be held liable for medical malpractice without such proof.

> In *Swanson* v. *Wasson,* 45 Idaho 309, 262 P. 147, 148, this court said:
>
> . . . .
>
> " 'If there is not injury caused by lack of skill or care, then there is no breach of the physician's obligation, and there can be no recovery. *Craig* v. *Chambers,* 17 Ohio St. 253, 260. Mere lack of skill, or negligence, not causing injury, gives no right of action, and no right to recover even nominal damages.
>
> * * *
>
> " 'Before the plaintiff can recover, she must show by affirmative evidence, first, that defendant was unskillful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury."

Willis v. *Western Hospital Assoc.,* 67 Idaho 435, 442, 182 P.2d 950 (1947). *See also, Blake* v. *Cruz,* 108 Idaho 253, 698 P.2d 315 (1985); I.C. 6-1012. Thus, if liability for medical malpractice constituted grounds for discipline, elements of proof would be required as a basis for such discipline which would not be required in a disciplinary proceeding under I.C. 54-1814(7) independent of a malpractice action.

Another potential for incongruity in using medical malpractice liability as a basis for a disciplinary proceeding is the issue of quality of the evidence required. A malpractice action based upon an error in judgment is tempered by the generally recognized error in judgment principle, i.e.," ' * * * a physician and surgeon is not liable for error of judgment if the same is consistent with the exercise of reasonable care and diligence * * *. To avoid liability, the judg-

ment must be based upon the exercise of reasonable care and skill.' " *Roach* v. *Hockey,* 634 P.2d 249, 252 (Ct.App.Or. 1981); *see also, Watson* v. *Hockett,* 727 P.2d 669 (Wash. 1986). This limiting principle which is applicable to malpractice actions is not facially or expressly made applicable to disciplinary proceedings.

These potential inconsistencies can be eliminated if the disciplinary proceeding is made subject to the following limitations: (1) Apply a clear and convincing evidence burden of proof to disciplinary proceedings. This would preclude use of liability for medical malpractice as a per se basis for disciplinary action through collateral estoppel or issue preclusion since a different burden of proof is involved. Rest. (Second) Judgments, Sec. 28(4). (2) Require as a basis for a disciplinary proceeding that the breach of the standard of care be dangerous to life or health. (3) Apply the limiting "error of judgment" principle to disciplinary proceedings.

The burden of proof limitation is supported by persuasive authority. *Yellen* v. *Board of Medical Quality Assur.,* 220 Cal.Rptr. 462 (Cal.App. 1985), *Ettinger* v. *Board of Medical Quality Assur.,* 185 Cal Rptr. 601 (Cal.App. 1982); *Pasha* v. *Board of Medical Quality Assur.,* 219 Cal.Rptr. 778 (Cal.App. 1985); *Hogan* v. *Mississippi Board of Nursing,* 457 So.2d 931 (Miss. 1984); *see also, Matter of Petrie,* 742 P.2d 796 (Ariz. 1987); *In Re Morrow,* 688 P.2d 820 (Or. 1984); *Matter of Depew,* 98 Idaho 215, 560 P.2d 886 (1977); *In Re Felton,* 60 Idaho 540, 94 P.2d 166 (1939); and see the classic statement of Justice Harlan as to the reasons for having different standards of proof in his concurring opinion in *In Re Winship,* 397 U.S. 358, 90 S.Ct. 1068 (1970). I do not consider the clear and convincing standard to be inconsistent with the standard of review under Idaho Code 67-5215(g).

A suggestion for imposition of the "dangerous to life or health" and "error of judgment" principles to disciplinary proceedings is found in cases from other jurisdictions cited with approval by the Idaho Supreme Court in *Tuma.* Re-

ferring to the Minnesota case of *Reyburn* v. *Minnesota State Board of Optometry,* the Idaho Court attributed the following to the Minnesota court:

> "The court said that the authority so conferred upon a board was 'to declare as 'unprofessional' only such conduct as fails to conform to those standards of professional behavior *which are recognized by a consensus of expert opinion as necessary for the public's protection.*' " (Emphasis Added.)

100 Idaho at 78. *See also,* the quote from the Arizona case of *Arizona State Board of Medical Examiners* v. *Clark,* at 100 Idaho 83.

PROPOSED FINDINGS OF FACT, AND CONCLUSIONS

Based upon and in accordance with the foregoing decision on issues of law and pursuant to the requirements of Rule 22.G.13.c., I hereby submit my proposed findings of fact and conclusions.

Proposed Findings of Fact as to Complaint Par. II(a). This paragraph makes the following allegations:

> (a) On or about March 21, 1988, Respondent delivered a baby boy, Patient D.K., (referred to throughout the record as "patient A"), at Respondent's birthing center located at 6565 Emerald, Boise, Idaho. Respondent improperly handled the delivery and subsequent problems following delivery in that Respondent:
>
> 1. Failed to transfer the mother to a hospital when meconium was noted;
>
> 2. Failed to use in internal scalp monitor to monitor the fetal heart rate during the second stage of labor; and
>
> 3. Made medical decisions based upon an inadequate and an unreadable monitor strip.

Proposed Findings of Fact: The following facts are established by clear and convincing evidence. Patient A was admitted to Respondent's birthing center at 4:00 o'clock p.m., on March 1, 1988, for delivery of a baby. At this time she was five to six centimeters dilated. Respondent artifi-

cially ruptured her membranes at 4:45 p.m., at which time the patient was seven to eight centimeters dilated, and a small amount of thick green meconium was noted. The patient was completely dilated at 5:55 p.m. The patient's second stage of labor lasted two hours and 45 minutes and the baby was delivered at 8:43 p.m., on March 21, 1988. At the time of delivery due to aspiration of immense amount of amniotic fluid with meconium the baby was not breathing. At that time there were two persons present, Respondent and the delivery nurse. Respondent performed suction and attempted intubation but was unsuccessful. Respondent then performed mouth-to-mouth resuscitation. Respondent had the nurse call the EMTs. The EMTs arrived at 8:47 p.m., at which time the baby was still in respiratory arrest. The EMTs bagged the baby and assisted Respondent in intubating the baby. An endotracheal tube was placed at 8:52 p.m., nine minutes after delivery. The baby began breathing on its own approximately 15 minutes after delivery. The baby was transported to the St. Luke's Neonatal Intensive Care Unit (NICU) and was admitted at 10:45 p.m., on March 21, 1988, and remained at St. Luke's for 15 days, being discharged April 5, 1988. The admitting diagnosis was meconium aspiration syndrome and birth asphyxia. In the hospital the baby experienced seizures related to the respiratory problems at birth.

Respondent admitted to Dr. Colwell in discussing this case that if Respondent had more patients that had meconium staining they would be transferred to a hospital right away.

The personnel available at Respondent's birthing center at the time of delivery of this baby were unable to perform necessary respiratory therapy for this baby.

If the patient had been transferred to a hospital at the time the meconium was first noted, intubation in the hospital could have been accomplished within seconds of birth by personnel trained in respiratory therapy.

Conclusions: It is established by clear and convincing evidence in the record that Respondent failed to meet the standard of health care provided by other qualified physicians in the same community, taking into account his training, experience and the degree of expertise to which he holds himself out to the public, in failing to immediately transfer the patient to a hospital when thick meconium was noted one hour and ten minutes before the patient reached the second stage of labor, thereby endangering the health and life of the baby. To the extent the decision not to transfer the patient to a hospital involved an error in judgment, the error in judgment was not consistent with the exercise of reasonable care and diligence.

Proposed Findings of Fact and Conclusions as to Allegations II, (b), (c), (d) and (e). These paragraphs make the following allegations:

> (b) On or around June 1, 1987, at St. Luke's Regional Medical Center in Boise, Idaho, Respondent performed elective total abdominal hysterectomy and bilateral salpingo oophorectomy on Patient B.M. (referred to throughout the record as "patient B") while Respondent's left are was immobilized and unusable, and began the surgery before the assisting physician was present.
>
> (c) On or around June 1, 1987, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed an elective exploratory laparatomy, fulgation of endometrial implants, uterine suspension and presacral neurectomy on Patient L.O. (referred to throughout the record as "patient C") while Respondent's left arm was immobilized and unusable, and with a family practitioner assisting.
>
> (d) On or around June 1, 1987, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed an elective laparotomy and bilateral salpingo oophorectomy on Patient C.S. (referred to throughout the record at "patient D") while Respondent's left arm was immobilized and unusable, and with a family practitioner assisting.

(e) On or about May 30, 1987, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed an elective diagnostic laparoscope and endometrial biopsy on a patient, Chart #118-560, (referred to throughout the record as "patient E") while his arm was immobilized and unusable.

Proposed Findings of Fact: The following facts are established by clear and convincing evidence. On May 25, 1987, Respondent suffered a fracture of his left wrist. The treating physician applied an external fixator traction device. The external fixator allowed Respondent to move his fingers but would interfere with grip. By May 29, 1987, Respondent was doing well with pain and had no unusual swelling and had good nerve function. Respondent wore the external fixator until June 22, 1987.

During the period that he was wearing the external fixator Respondent performed the following surgical procedures on patients B, C, D, and E with his left hand and arm inside the surgical gown during the operations.

On June 1, 1987, Respondent performed an elective total abdominal hysterectomy and bilateral salpingo oophorectomy on patient B with the assistance of Dr. Robert Bailey who was board certified in obstetrics and gynecology. The surgery was completed without problems.

On June 1, 1987, Respondent performed an elective uterine suspension, cauterization of endometriosis lesions, lysis of adhesions, and a presacral neurectomy on patient C with the assistance of Dr. Kenneth H. Weitemier, who was board certified as a family practice physician and surgeon. The surgery was completed without problems.

On June 1, 1987, Respondent performed an elective laparotomy and bilateral salpingo oophorectomy on patient D with the assistance of Dr. Kenneth H. Weitemier, who was board certified as a family practice physician and surgeon. The surgery was completed without problems.

On May 30, 1987, Respondent performed an elective diagnostic laparoscopy and an endometrial biopsy with the

assistance of a private scrub nurse who was privileged as a surgical assistant. The procedures were completed without problems.

Conclusions: The surgeries on and health care provided to patients B, C, D and E met the standard of health care provided by other qualified physicians in the community taking into account Respondent's training, experience and the degree of expertise to which he holds himself out to the public.

The issue of whether performance of these surgeries by Respondent while his left hand was in the fixator device and his left hand and arm were kept under the surgical gown was per se a violation of the community standard of health care is a matter of sharp disagreement in the medical community. The Complainant failed to prove by clear and convincing evidence that there is a consensus among surgeons practicing in the community that such surgeries in the manner and under the circumstances in which they were performed by Respondent in these cases were per se violations of the community standard of care provided by other qualified physicians in the community.

Proposed Findings of Fact and Conclusions as to Allegations II, (f). This paragraph makes the following allegations:

> (f) On or around March 28, 1986, at St. Luke's Regional Medical Center, Respondent performed a vaginal delivery of the baby of Patient C.W., (referred to throughout the record as "patient F") utilizing vacuum extraction and a forceps delivery with the baby being born with significant facial and skull fractures and bruising. Respondent's use of the vacuum extractor and use of the forceps for a mid-pelvic delivery and Respondent's failure to perform a C-Section delivery were inappropriate.

Proposed Findings of Fact: The following facts are established by clear and convincing evidence. Patient F, 18 years of age, and having her first baby was admitted to St.

Luke's hospital on March 27, 1986, at 3:45 p.m. At this time the patient was two centimeters dilated. At 9:30 p.m., the dilation was the same with irregular mild contractions. This patient achieved complete dilation at 9:00 o'clock a.m., on March 28, 1986, and began pushing. A caput was first noted at 10:05 a.m. After she had pushed for two hours the patient had brought the head down to the perineum and the leading portion of the vextex into the introitus, but had not gotten to the point where delivery was imminent. At that point Respondent discussed with the patient the options of use of a vacuum extractor, cesarean section or continued pushing. Respondent suggested use of the vacuum extractor and the patient consented. Respondent made eight pulls with a vacuum extractor which increased the amount of caput. After eight pulls the suction cup would no longer stay on the head of the fetus. After vacuum extractor came off, the head went back into the pelvis. Respondent then determined with the patient's consent to complete the delivery with the forceps. The second stage lasted three hours and 15 minutes and the baby was delivered at 12:15 on March 28, 1986, with the use of forceps. Because of edema the landmarks used in determining the position of the baby's head were obscured; however, in spite of this, Respondent attempted to diagnose the position of the baby's head. Respondent noted that he found it very difficult to determine the exact orientation of the fetal skull, and mistakenly diagnosed the position of the baby to be in the occiput anterior position. As a result the forceps were placed over the baby's face causing significant injuries to the baby because of the malpositioning of the forceps. Respondent admitted that the forceps were misapplied.

Conclusions: It is established by clear and convincing evidence in the record that the standard of health care provided by other qualified physicians in the same community, taking into account Respondent's training, experience and the degree of expertise to which he holds himself out to the public, requires an obstetrician to know the position exactly

of the fetal head before application of forceps and then after application to check the position again before application of traction. It is established by clear and convincing evidence in the record that Respondent failed to meet this standard of health care by assuming that he could correctly diagnose the exact position of the fetal head in the face of the fact that the landmarks necessary to make such diagnosis were obscured, thereby endangering the health of the baby. To the extent the misdiagnosis involved an error in judgment, the error in judgment was not consistent with the exercise of reasonable care and diligence. Under the circumstances, the diagnosis appears to have been made more by guess than informed judgment.

Proposed Findings of Fact as to Complaint Par. II(g)

This paragraph make the following allegations:

> (g) On or around June 17, 1986, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed a C-Section delivery of the baby of Patient C.G. (referred to throughout the record as "patient G"). There was an inappropriate delay in performing the C-Section in light of evidence of fetal distress.

Proposed Findings of Fact: The following facts are established by clear and convincing evidence. Patient G was admitted to St. Alphonsus Regional Medical Center on June 16, 1986, at 8:55 p.m., for delivery of a baby. The patient's membrane ruptured spontaneously at 10:45 p.m. The nurse noted meconium in the fluid and at 11:00 p.m., notified Respondent of meconium light green in color. The patient made slow progress throughout the evening of June 16, 1986. She achieved 3 to 4 centimeters dilation in the early morning of June 17, 1986. Variable fetal heart rate decelerations occurred intermittently throughout the morning of June 17, 1986, with slow recovery. The decelerations did not appear to be related to contractions, were spontaneous in their onset and their pattern was consistent. Respondent examined the patient at 5:30 a.m., on June 17, 1986. She was still 4 to 5 centimeters dilated, making

some progress but without any fetal head molding or caput formation. At that time Respondent decided that a fetal scalp ph ought to be obtained to test fetal status. A kit was not available at St. Alphonsus so arrangements were made to obtain one from St. Luke's, but the one that was sent over was outdated. During this entire time there were period of good fetal heart rate variability. The cause of the decelerations was not clear although there was some correlation with the position of the mother. The patient failed to progress to the point where delivery was to occur. She was 5 to 6 centimeters dilated. At 9:20 a.m., June 17, 1986, Respondent made the decision to do a cesarean section. The baby was delivered at 10:04 a.m., on June 17, 1986. The baby was transported to NICU where it was admitted for two days. The admitting diagnosis was post mature male infant and meconium aspiration mild.

Conclusions: Complainant has failed to prove by clear and convincing evidence that Respondent provided health care to patient G which failed to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public, in that under the circumstances involved in this case the decision as to when it was appropriate to do a cesarean section involved a matter of judgment and it was not proved by clear and convincing evidence that Respondent failed to exercise reasonable care and diligence in making the judgment in this case in light of all of the circumstances involved.

Proposed Findings of Fact as to Complaint Par. II(h). This paragraph makes the following allegations:

> (h) On or around April 15, 1986, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed a C-Section delivery of the baby of Patient P.J. (referred to throughout the record as "patient H"). There was an inappropriate delay in performing the C-Section in light of evidence of fetal distress.

Proposed Findings of Fact: Patient H was admitted to St. Alphonsus Regional Medical Center on April 15, 1986, at 4:17 p.m., for delivery of a baby. At 5:30 p.m., fetal heart rate decreased and the nurse administered oxygen to the patient. Thereafter the heart rate returned to normal. At 5:45 p.m., there was a further decrease in the fetal heart rate of 10 to 20 beats per minute after a contraction of 60 second duration. The heart rate thereafter returned to normal. At 6:00 p.m., a report was given to Respondent and he came to the hospital. At 6:15 he did a vaginal exam and the membranes were ruptured. At that time the patient was dilated 4 to 5 centimeters. There were very mild or subtle decelerations in the fetal heart rate that continued through 7:20 p.m., with variability. There continued to be intermittent decelerations which returned to baseline. Labor was allowed to continue and the patient eventually reached complete dilation at 10:15 p.m., and began the second stage of labor. When she started her second stage there were episodes of slow fetal heart rate but the baby seemed to recover and showed adequate response to those episodes. The patient was unable to bring the baby down through the pelvis more than a plus one to plus two station. At 11:00 p.m., Respondent made the diagnosis of cephalopelvic disproportion and made the decision to perform a cesarean section. The baby was delivered at 11:57 p.m. The baby was transferred to NICU. The admitting diagnosis included a post-term infant and hypoglycemia.

The Complaint's experts were not in agreement as to whether failure on the part of Respondent to perform a cesarean section earlier violated the community standard of health care provided by other qualified physicians.

Conclusions: Complainant has failed to prove by clear and convincing evidence that Respondent provided health care to patient H which failed to meet the standard of health care provided by other quailified physicians in the same community or similar communities, taking into account

his training, experience and the degree of expertise to which he holds himself out to the public, in that under the circumstances involved in this case the decision as to when it was appropriate to do a cesarean section involved a matter of judgment and it was not proved by clear and convincing evidence that Respondent failed to exercise reasonable care and diligence in making the judgment in this case in light of all of the circumstances involved.

PROPOSED ORDER

Based upon this Hearing Officer's decision on issues of law, proposed findings of fact, and conclusion, I propose that an Order in the following form be entered:

It having been determine that Respondent provided health care to patients A and F which failed to meet the standard of health care provided by other quailified physicians in the same community or similar communities, taking into account Respondent's training, experience and the degree of expertise to which he holds himself out to the public; and

That said violations of the community standard of care constitute grounds for discipline under Idaho Code section 54-1914(7); and

It further appearing that said violations were isolated instances, widely separated in time, and do not form a pattern of violations of the community standard of health care provided by other qualified physicians; and

It further appearing that because of the nature of said violations and the circumstances under which they were committed, they do not tend to establish that Respondent is in any respect incompetent to continue to practice medicine;

IT IS HEREBY ORDERED That Respondent be disciplined by imposing as conditions of continued licensure that Respondent:

1. Not perform deliveries of any babies when meconium is noted during labor without having personnel skilled in

providing respiratory therapy present at the time of delivery to assist Respondent; and

2. Not perform forceps delivery of any baby where the head is still in the pelvis and the landmarks are so obscured by edema that it is difficult to diagnose the position of the head.

RESPECTFULLY SUBMITTED This 30th day of November, 1989.

/s/ J. Ray Durtschi
J. Ray Durtschi
Hearing Officer

Case No. 88-043

BEFORE THE BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE

In the Matter of

PHILIP M. KRUEGER, M.D.,
License No. M-3549,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came on for consideration before the Board of Professional Discipline of the Idaho State Board of Medicine, hereinafter referred to as the Board, at a meeting on January 12, 1990. Prior to the meeting, each member of the Board was provided with copies of the record and with the Decision and Report of Hearing Officer and Proposed Findings of Fact, Conclusions of Law and Order. All members of the Board who participated in this decision read the record and Decision and Report.

Initially, the Board reviewed Respondent's Motion to Supplement the Record and Respondent's Brief, dated January 11, 1990, and the Board's Objection to Consideration of Jury Verdict and the Board's Brief, dated January 11, 1990. The Board unanimously voted to deny Respondent's Motion.

Thereafter, having reviewed and discussed the record in this case, the Board unanimously finds and concludes as follows:

FINDINGS OF FACT

1. The eight cases reviewed fall into two main categories.

2. One group of four consists of surgical procedures performed by the Respondent five to seven days following fracture of his left wrist. The injury, which occurred on May 25, 1987, was treated with an external fixation device. In each of these four cases, the Respondent operated with his left hand and arm wrapped beneath his surgical gown.

3. The Board reviewed and rejected the Hearing Officer's finding and conclusion that, in an administrative disciplinary proceeding, the Board must prove injury or death to patients in order to establish breach of the community standard of care.

4. The Board reviewed and rejected the Hearing Officer's finding and conclusion that, in an administrative disciplinary proceeding, there must be a consensus among practicing physicians in order to establish a violation of the community standard of care.

Surgical Cases

5. *Patient DM, referred to as Patient B:* On June 1, 1987, at St. Luke's Regional Medical Center, this 28-year-old female had an elective hysterectomy and bilateral salpingo-oophorectomy. She had previous abdominal surgeries including bowel resection for obstruction. The Respondent started the surgery and entered the peritoneal cavity prior to the arrival of Dr. Bailey, a board certified obstetrician-gynecologist, who assisted with the remainder of the surgery.

6. *Patient LO, referred to as Patient C:* On June 1, 1987, at St. Alphonsus Regional Medical Center, this 29-year-old female had an elective laparotomy with fulguration of foci of endometriosis, uterine suspension, lysis of adhesions, and presacral neurectomy. Respondent was assisted in this case by Dr. Weitemier, a family practitioner, who had no surgical privileges at St. Alphonsus Regional Medical Center.

7. *Patient CS, referred to as Patient D:* On June 1, 1987, at St. Alphonsus Regional Medical Center, this 35-year-old female had an exploratory laparotomy for a pelvic mass which proved to be a benign mucinous cyst of the left ovary. A bilateral salpingo-oophorectomy was performed. Respondent was assisted on this case by Dr. Weitemier.

8. *Patient LW, referred to as Patient E:* On May 30, 1987, at St. Alphonsus Regional Medical Center this 29-year-old female had an elective diagnostic laparoscopy and endometrial biopsy.

9. The Board finds by clear and convincing evidence that, during each of these four surgeries, the Respondent had a significant physical injury which precluded the effective use of his left hand. The performance of elective intraabdominal surgery under such circumstances does not meet the standard of health care provided by other qualified physicians in the community, taking into account the Respondent's training, experience and the degree of expertise with which he holds himself out to the public.

10. The Board unanimously condemns surgery performed by physicians who are physically and/or mentally impaired.

Obstetrical Cases

11. *Patient DK, referred to as Patient A:* On March 21, 1988, at 1600, a 22-year-old primigravida female was admitted to the Respondent's birthing center located in Boise, Idaho. She was five to six centimeters dilated. The Respondent artificially ruptured her membranes at 1645 hours when she was seven to eight centimeters dilated. Thick green meconium was noted within the amniotic fluid when the membranes were ruptured. The patient was fully dilated at 1755 hours and proceeded into the second stage of labor which lasted two hours 45 minutes with the infant delivered at 2043 hours. During the labor process, the infant was monitored with an external monitoring device, the tracing of which proved to be unreadable. Following delivery, the infant was essentially unresponsive with

massive aspiration of meconium. The Respondent was initially unsuccessful at intubation. On the second attempt, nine minutes after delivery, an endotracheal tube was successfully placed by the Respondent. Upon delivery, EMTs were called and arrived at 2047 hours and assisted in resuscitation of the infant. The child had an Apgar score of 1 at one minute, 1 at five minutes, and 5 at fifteen minutes. The infant was transported to St. Luke's Neonatal Intensive Care Unit and was admitted at 2245 hours on March 21, 1988. The infant required hospitalization for fifteen days, being discharged April 5, 1988. During the first days of admission, the child had seizures which were attributed to birth asphyxia.

12. The Board finds by clear and convincing evidence that the Respondent should have transferred the mother during the first stage of labor, immediately upon noting meconium stained amniotic fluid, and the personnel available at Respondent's birthing center at the time of delivery were unable to perform necessary respiratory therapy.

13. The Board also finds by clear and convincing evidence that the status of the fetus should have been followed with an internal monitor.

14. The Board finds by clear and convincing evidence that Respondent's management of this case does not meet the standard of care provided by other qualified physicians in the Boise community, taking into account the Respondent's training, experience and degree of expertise to which he holds himself out to the public.

15. *Patient CW, referred to as Patient F:* On March 28, 1986, at St. Luke's Regional Medical Center, Respondent performed a vaginal delivery on an 18-year-old primigravida female utilizing vacuum extraction and forceps delivery. The infant suffered significant injury, particularly involving the nose, due to the misapplication of the forceps.

16. The forceps were applied with the landmarks obscured by caput formation and unusual presentation of the fetal head.

17. The Board finds by clear and convincing evidence that application of forceps when landmarks are not clearly delineated does not meet the standard of care provided by other qualified physicians in the Boise community, taking into account the Respondent's training, experience and degree of expertise to which he holds himself out to the public.

18. *Patient CG, referred to as Patient G:* This patient was admitted on June 16, 1986, to St. Alphonsus Regional Medical Center, at 2055 hours, for delivery of a baby. Membranes were ruptured at 2245 hours and meconium was noted. The patient made slow progress during the evening of June 16, 1986, and into the morning hours of June 17, 1986, with intermittent periods of fetal heart rate deceleration. At 0530 hours on June 17, 1986, she was four to five centimeters dilated. The periods of deceleration were interspersed with periods of good fetal heartbeat variability. By 920 hours, she was only five to six centimeters dilated and a decision was made to perform a Cesarean section, which was completed at 1004 hours. The infant was diagnosed as a postmature male with mild meconium aspiration.

19. The Board finds that this case meets the standard of health care provided by other qualified physicians in the community, taking into account the Respondent's training, experience, and the degree of expertise with which he holds himself out to the public.

20. *Patient PJ, referred to as Patient H:* On April 15, 1986, at 1617 hours, this 27-year-old primigravida female was admitted to St. Alphonsus Regional Medical Center in labor. Her estimated due date was April 7, 1986. Shortly after admission, the nurses began reporting decelerations of the fetal heart rate. Decelerations continued through the early evening hours. At 1905 hours, Respondent made a decision to perform a paracervical block. Sensorcaine (bupivicaine) was used at a concentration of 0.25%. Following the injection of Sensorcaine (bupivicaine), the fetus experienced a twelve minute period of severe bradycardia. At 2150 hours, pitocin was administered at a rate of 6-18 milliliters per hour. At 2300 hours, the decision was made

to perform a Cesarean section and the infant was delivered at 2357 hours.

21. The Board finds by clear and convincing evidence that the use of Sensorcaine (bupivicaine), was contraindicated for use as a paracervical block, and the Board finds that the prolonged period of bradycardia following the paracervical block was directly associated with the injection of Sensorcaine (bupivicaine).

22. The Board also finds by clear and convincing evidence that it was inappropriate to use pitocin on a distressed infant.

23. The Board finds by clear and convincing evidence that Respondent's management of this case did not meet the standard of care provided by other qualified physicians in the Boise community, taking into account the Respondent's training, experience and degree of expertise to which he holds himself out to the public.

CONCLUSIONS OF LAW

24. The Board reviewed and rejected the Hearing Officer's conclusion that, in an administrative disciplinary proceeding, the Board must prove injury or death to patients in order to establish breach of the community standard of care.

25. The Board reviewed and rejected the Hearing Officer's conclusion that there must be a consensus among practicing physicians in order to establish a violation of the community standard of care.

26. The Board concludes that the Respondent's provision of health care in cases A, B, C, D, E, F, and H did not meet the standard of care provided by other qualified physicians in the Boise community, taking into account the Respondent's training, experience and degree of expertise to which he holds himself out to the public, in violation of Idaho Code §54-1814(7).

27. The management of Patient G did meet the standard of care in the community.

28. The Board concurs with the conclusion of the Hearing Officer that Idaho Code §54-1814(7) is not unconstitutionally vague.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that Respondent's license to practice medicine and surgery in the State of Idaho shall be revoked; provided however, that revocation shall be stayed for so long as Respondent complies with the following terms and conditions:

1. Respondent shall not perform surgery while impaired physically or mentally;

2. Respondent shall perform obstetrics only in a hospital accredited by the Joint Commission on Accreditation of Health Care Organizations; and

3. Respondent shall obtain consultation by a Board eligible or certified obstetrician-gynecologist on all high risk pregnancies.

The Board will monitor Respondent's practice for a five year period, at the end of which time, the Board will review the Respondent's case. The Board reserves the right to lift the stay, prior to hearing, during this probationary period for just cause.

Dated this 30th day of January, 1990.

Board of Professional Discipline
By: /s/ G. Ellwein, MD
Gary E. Ellwein, M.D.
Chairman

IN THE

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF
PHILIP M. KRUEGER, M.D.
License No. M-3549

Case No. 93335

DECISION—Filed February 27, 1991

Appearances:

David Nye, counsel for plaintiff

Jean Uranga, counsel for defendant

HONORABLE GEORGE D. CAREY, District Judge

Dr. Krueger has petitioned for judicial review of the decision of the Board of Professional Discipline of the Idaho State Board of Medicine concerning his license to practice medicine. The decision is remanded to the board with directions.

Dr. Krueger is a board-certified obstetrician and gynecologist who has practiced in the Boise area since 1976. On November 8, 1988 the executive director of the Board of medicine instituted disciplinary proceedings against Dr. Krueger. After extensive presentation of evidence and argument, a hearing officer recommended findings of fact, conclusions of law, and an order to the board of discipline. The board independently reviewed the record and the recommendations and then entered its own findings of fact, conclusions of law, and order in January 1990. The board concluded that Dr. Krueger violated I.C. § 54-1814(7) in

the course of providing care on seven different occasions during a two-year period. The board revoked his license to practice medicine and surgery for five years but stayed the revocation on the following conditions:

1. Dr. Krueger was not to perform surgery while impaired physically or mentally:

2. Dr. Krueger was to perform obstetrics only in hospitals accredited by the Joint Commission on Accreditation of Health Care Organizations;

3. Dr. Krueger was to obtain consultation by a board-certified or board-eligible obstetrician-gynecologist on all high-risk pregnancies.

In his appeal, Dr. Krueger raises three issues:

1. Were the board's grounds for discipline unconstitutionally vague?

2. Did the board violate his constitutionally-protected right to due process?

3. Did the board err in not considering a jury-verdict in a medical malpractice case involving the same facts as one of the disciplinary cases?

The disciplinary case against Dr. Krueger involved eight different physician-patient relationships. In one instance the board found no violation. The other seven incidents embrace the following allegations and facts.

1. The Forceps Delivery of March 28, 1986 (Patient F). The complaint against Dr. Krueger alleged the following:

> On or about March 28, 1986, at St. Luke's Regional Medical Center, Respondent performed a vaginal delivery of the baby of Patient [F]. . , utilizing vacuum extraction and a forceps delivery with the baby being born with significant facial and skull fractures and bruising. Respondent's use of the vacuum extractor and use of the forceps for a mid-pelvic delivery and Respondent's failure to perform a C-Section delivery were inappropriate.

The evidence showed that Patient F was an eighteen year old woman who was pregnant for the first time. Dr. Krueger had her admitted to St. Luke's during the after-

noon of March 27, 1986, while she was in the first stage of labor. By 9:00 the following morning, she was completely dilated and started pushing. The second stage of labor continued until noon. By 10:00 a.m. a swelling or caput on the presenting portion of the infant's head was noted. Sometime later Dr. Krueger attempted without success to assist the delivery with a vacuum extractor. He then used forceps in the delivery, notwithstanding his inability to be sure of the head position due to distortion of the landmarks. The baby was delivered at 12:15 p.m. with severe head trauma from the stress of the delivery and the application of the forceps over the baby's face.

The board concluded that application of forceps when landmarks on the infant's head were not clearly delineated did not meet the standard of care of other qualified physicians in the Boise community, taking into account Dr. Krueger's training, experience, and the degree of expertise to which he held himself out to the public.

In August of 1988, the baby's parents instituted a medical malpractice action against Dr. Krueger in Ada County Case No. 91861. After presentation of evidence to the hearing officer in the disciplinary matter, but before he made his recommendations to the board, the jury in the malpractice case returned a verdict absolving Dr. Krueger of monetary liability. The jury answered the following special verdict question:

> Question: Was the defendant, Philip M. Krueger, negligent, which negligence was a proximate cause of the plaintiff['s] . . . injuries?
>
> Answer: No.

Although requested to do so, the board refused to consider the jury verdict in reaching its decision.

2. C-Section Delivery of April 15, 1986 (Patient H). The complaint against Dr. Krueger alleged the following:

> On or around April 15, 1986, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed a c-section delivery of the baby of patient [H]. . . .

There was an inappropriate delay in performing the c-section in light of evidence of fetal distress.

The evidence showed that patient H was a twenty-seven year old women who was pregnant for the first time. On April 15, 1986, at 4:17 p.m., she was admitted to St. Alphonsus Regional Medical Center while in labor. Her child then was one week overdue. Shortly after admission, the nursing staff reported decelerations of the fetal heart rate which continued throughout the early evening. At 5:30 p.m. the fetal heart rate decreased, and a nurse administered oxygen to the patient. The fetal heart rate returned to normal. At 5:45 p.m. there was a further decrease in the fetal heart rate to 10 to 20 beats per minute following a sixty second contraction. The heart rate then returned to normal. This information was relayed at 6:00 p.m. to Dr. Krueger who immediately came to the hospital. At 6:15 p.m. he did a vaginal examination and ruptured the patient's membranes. There continued to be mild decelerations and returns to baseline of the fetal heart rate.

At 7:05 p.m. Dr. Krueger decided to perform a paracervical block, a form of regional anesthesia. He injected a solution of a local anesthetic know as sensorcaine (bupivacaine hydrochloride). Following the injection, the baby experienced a twelve minute period of severe bradycardia or reduction in heartbeat rate.

At 9:50 p.m., Dr. Krueger administered pitocin, an oxytocic used to stimulate and augment labor. The patient reached complete dilation around 10:15 p.m. and began the second stage of labor. Again there were episodes of slow fetal heart rate, but the baby seemed to recover. The patient was unable to push the baby beyond a +1 to +2 station. At 11:00 p.m. Dr. Krueger decided that the size of the baby's head in proportion to the birth canal was too large to permit normal vaginal delivery. He performed a c-section and delivered the baby at 11:57 p.m. The baby was transferred to the neonatal intensive care unit.

Expert witnesses testified during the hearing, without objection by Dr. Krueger's attorney, that the use of

sensorcaine and pitocin did not meet the local standard of care under the circumstances presented during patient H's labor. (Transcript, pp. 544-545, 771-776). Dr. Krueger did object to consideration of this evidence as a ground for discipline in his closing argument and brief. (Krueger's Closing Argument and Brief dated October 4, 1989, at 35).

The board did not conclude that the delay in performing a c-section violated the standard of care. It did conclude, however, that Dr. Krueger's management of the case did not meet the standard of care of other qualified physicians in the Boise community, taking into account his training, experience, and the degree of expertise to which he held himself out to the public, in the following respects:

> 1. The use of sensorcaine was contraindicated and was directly associated with the subsequent fetal bradycardia;
>
> 2. The use of pitocin was inappropriate, considering the distressed nature of the fetus.

3. The Birthing Center Delivery of March 1, 1988 (Patient A). The complaint against Dr. Krueger alleged the following:

> On or about March 21, 1988, Respondent delivered a baby boy,. ., at respondent's birthing center located at 6565 Emerald, Boise, Idaho. Respondent improperly handled the delivery and subsequent problems in that Respondent:
>
> 1. Failed to transfer the mother to a hospital when meconium was noted;
>
> 2. Failed to use an internal scalp monitor to monitor fetal heart rate during the second stage of labor; and
>
> 3. Made medical decisions based upon an inadequate and an unreadable monitor strip.

The evidence showed that Patient A was a twenty-two year old woman who was pregnant for the first time. She was admitted to Dr. Krueger's privately owned and operated birthing center in Boise on March 21, 1988, at 4:00 p.m. She was in the first stage of labor and five to six centime-

ters dilated. Dr. Krueger ruptured here membranes at 4:45 p.m. when she was seven to eight centimeters dilated. Thick green meconium (fetal stools which are a recognized sign of fetal distress) was noted in the amniotic fluid. Full dilation occurred at 5:55 p.m. The patient proceeded into the second stage of labor and a child was delivered nearly three hours later at 8:43 p.m. During labor the fetus was monitored with an external device. Much of the readout from the monitor was indecipherable.

When the baby was delivered, it had extremely low Apgar scores (a method of evaluating a baby's physical condition shortly after birth, based on a rating of five factors reflecting its ability to adjust to extrauterine life). It was essentially unresponsive, due to meconium inhalation. Dr. Krueger immediately contacted emergency medical technicians and attempted intubation without initial success. Ultimately an endotracheal tube was inserted and the baby was revived with the assistance of the EMTs, who had arrived at 8:47 p.m.

The child was admitted to the neonatal intensive care unit at St. Luke's R.M.C. at 10:45 p.m. It was hospitalized for fifteen days and ultimately released on April 5, 1988. During the first days of hospitalization the child had seizures attributable to birth asphyxia. It is too early to tell whether the child will suffer any permanent impairment due to the problems encountered at delivery.

The board concluded that Dr. Krueger's management of the case did not meet the standard of care provided by other qualified physicians in the Boise community, taking into account his training, experience, and the degree of expertise to which he held himself out to the public, in the following respects:

1. Dr. Krueger should have transferred the mother to a hospital with an obstetrical unit immediately upon noting meconium staining, since his birthing clinic was not adequately staffed to meet the predictable complications.

2. Dr. Krueger should have monitored the status of the fetus with an internal rather than an external monitor.

4. One-handed Elective Surgeries in May and June of 1987 (Patients B, C, D, and E). The complaint against Dr. Krueger alleged the following:

> (b) On or around June 1, 1987, at St. Luke's regional Medical Center in Boise, Idaho, Respondent performed elective total abdominal hysterectomy and bilateral salpingo oophorectomy on Patient [B]. . . while Respondent's left arm was immobilized and unusable, and began the surgery before the assisting physician was present.
>
> (c) On or around June 1, 1987, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed an elective exploratory laparotomy, fulguration of endometrial implants, uterine suspension and presacral neurectomy on Patient [C] . . . while Respondent's left arm was immobilized and unusable, and with a family practitioner assisting.
>
> (d) On or around June 1, 1987, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed an elective laparotomy and bilateral salpingo oophorectomy on Patient [D] . . . while Respondent's left are was immobilized and unusable, and with a family practitioner assisting.
>
> (e) On or about May 30, 1987, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed an elective diagnostic laparoscope and endometrial biopsy on . . . Patient [E] . . . while his arm was immobilized and unusable.

The evidence showed that Dr. Krueger suffered a severe fracture to his left wrist on May 25, 1987. An orthopedic surgeon operated and placed an external fixator on the wrist. Placement of the fixator necessarily resulted in an open wound on the left arm. Dr. Krueger wore the fixator until June 22, 1987. Although there was movement in the fingers of his left hand, Dr. Krueger could not grip with the hand, could not scrub without assistance, and could not conveniently place a sterile glove over the fixator. By May 29th he was doing well with pain, had no unusual swelling, and had good nerve function.

On four occasions on May 30th and on June 1st he performed elective surgeries with his left hand and arm inside a surgical gown and using only his right hand. All of the surgeries were successful.

Patient B's surgery occurred on June 1st at St. Luke's. She was an overweight twenty-eight year old who previously had undergone abdominal surgeries including a bowel resection. Dr. Krueger performed an elective total abdominal hysterectomy and bilateral salpingo oophorectomy (removal of the ovaries). Dr. Bailey, a board-certified obstetrician-gynecologist, had agreed to assist in the operation. Dr. Krueger, however, began the surgery and entered the peritoneal cavity prior to Dr. Bailey's arrival at the operating room. Dr. Bailey assisted in the remainder of the surgery.

Patient C's surgery occurred on June 1st at St. Alphonsus. Dr. Krueger performed an elective laparotomy (an incision into the peritoneal cavity), fulguration (electrodesiccation of tissue) of foci of endometriosis (an abnormal gynecological condition), uterine suspension, lysis (destruction) of adhesions, and presacral neurectomy. He was assisted by Dr. Weitemier, a board-certified family practitioner who did not have surgery privileges at St. Alphonsus.

Patient D's surgery occurred on June 1st at St. Alphonsus. Dr. Krueger performed an elective exploratory laparotomy for a pelvic mass which proved to be a benign mucinous cyst of the left ovary. He also performed a bilateral salpingo oophorectomy. Dr. Weitemier assisted.

Patient E's surgery occurred on May 31st at St. Alphonsus. Dr. Krueger performed an elective diagnostic laparoscopy (examination of the abdominal cavity with a laparoscope) and endometrial biopsy. He was assisted by a private scrub nurse who had privileges as a surgical assistant.

The board concluded that Dr. Krueger's management of the cases did not meet the standard of care provided by other qualified physicians in the Boise community, taking

into account his training, experience, and the degree of expertise to which he held himself out to the public, in the following respect:

> Dr. Krueger should not have performed any of the elective intra-abdominal surgeries when a significant physical injury prevented the effective use of his left hand.

The board also made a general statement condemning surgery performed by physicians who are physically or mentally impaired.

The evidence concerning the one-handed surgeries included expert testimony that performance of elective intra-abdominal surgery by a doctor with a physical impairment precluding the effective use of one hand did not meet the local standard of care for board-certified obstetricians and gynecologists. There was testimony, however, from other doctors which suggested that surgery under similar circumstances did not necessarily violate the local standard of care.

STANDARD OF REVIEW

District Court review of an administrative agency decision is limited. The review is conducted without a jury and is confined to the agency record. The court must not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm a decision or remand it to the agency for further proceedings. The court may reverse or modify a decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

1. in violation of constitutional or statutory provisions;
2. in excess of the statutory authority of the agency;
3. made upon unlawful procedure;
4. affected by other error of law;
5. clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

6. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. I.C. § 67-5215(f)(g).

VAGUENESS ARGUMENT

Dr. Krueger argues that the statutory test used against him is constitutionally vague, both on its face and as applied to the surgeries he performed while his left arm was restrained by a fixator. The disciplinary standard at issue reads:

> Every person licensed to practice medicine . . . in this state is subject to discipline by the board . . , upon any of the following grounds:
>
> ****
>
> (7) The provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public.
>
> ****
>
> I.C. § 54-1814(7).

The Board has not promulgated any regulations to further define or explain the statute, nor has the statute been judicially interpreted in this state. Language similar to that contained in the statute, however, has been used for years in Idaho to define medical malpractice. It is a well-known concept in medical circles and has been interpreted in many cases. See, e.g., *LaPelley* v. *Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980); *Swanson* v. *Wasson*, 45 Idaho 309, 262 P. 147 (1927), I.C. § 6-1012.

The void-for-vagueness concept, as applied to professional disciplinary proceedings, has been discussed in several Idaho cases. Generally, a statute is:

> unconstitutionally vague when its language does not convey sufficiently definite warnings as to the proscribed conduct, and its language is such that men of common intelligence must necessarily guess at its

meaning. *Wycoff* v. *Board of County Commissioners of Ada County*, 101 Idaho 12, 15, 607 P.2d 1066 (1980), as cited in *H&V Engineering* v. *Board of Professional Engineers*, 113 Idaho 646, 747 P.2d 55 (1987).

The purpose of the doctrine is to give fair warning of proscribed conduct, to prevent arbitrary and discriminatory enforcement, and to guide the agencies required to pass judgment on licensees. Even if a statute is not unconstitutionally vague on it face, it may be unconstitutionally vague as applied to specific conduct alleged as the basis of professional misconduct. *Tuma* v. *Board of Nursing*, 100 Idaho 74, 593 P.2d 711 (1979). It is appropriate for a professional disciplinary board to determine the standards of the profession merely by applying its own personal knowledge, experience, and expertise. *H&V Engineering*, *id.*

Language never can be perfectly precise. If a statute provides an ascertainable standard with reasonable specificity, it is not unconstitutionally vague on its face. Compare, *Coates* v. *Cincinnati*, 402 U.S. 611 (1971). Furthermore, the statute in question is not intended to regulate the conduct of all people but rather people "licensed to practice medicine." Consequently the inquiry should be whether the statute conveys sufficiently definite warnings to people of common intelligence who are licensed to practice medicine. In that context, and with the consistent use of similar language throughout the modern history of the practice of medicine in Idaho, I conclude that the statute is not unconstitutionally vague on its face.

The application of the statute to the facts of the one-armed surgeries, however, presents additional problems. As the transcript of the testimony reveals, there was a significant difference of opinion among the expert witnesses whether performance of the operations met the local standard of care. The Board concluded that it did not. In its conclusions, however, the board did not explicitly or implicitly state that it was satisfied from the evidence that the standard it adopted was one recognized by a consensus of expert opinion.

As the hearing officer pointed out in his proposed findings, the Idaho Supreme Court in the *Tuma* case cited with apparent approval language suggesting that "unprofessional conduct" could be "*only* such conduct as fails to conform to those standards of professional behavior which are recognized by a consensus of expert opinion as necessary for the public's protection." 100 Idaho, at 78. While this case concerns conduct not meeting the local standard of health care rather than "unprofessional" conduct, I believe that the *Tuma* language suggests that there must be a consensus of credible expert opinion concerning the applicable standard of health care before a conclusion may be reached that a course of conduct violated the standard.

The board did state that it believed that the evidence showed a deviation from the standard of care. It is not clear, however, that it concluded that there was a consensus of expert opinion as to the standard of care. True, the board "unanimously condemn[ed] surgery performed by physicians who are physically and/or mentally impaired", but that is not the same as concluding that the evidence objectively demonstrated a consensus of opinion. A conclusion such as the board reached runs the risk of being the personal opinion of the board members and not the consensus of expert opinion presented at trial.

Consequently the case must be remanded for the board to prepare further findings concerning the consensus of expert opinion as it was developed through the evidence presented at trial and as it related to the surgeries performed on patient's B, C, D, and E. If after consideration, the board changes its ultimate conclusion with respect these surgeries, then it also should reconsider the decision to discipline Dr. Krueger.

In giving directions to the board, I am not suggesting that I believe a particular conclusion ought to be reached. Such a suggestion would be beyond the appropriate scope of judicial review.

DEVIATIONS BETWEEN ALLEGATIONS AND PROOF

In patient H's case, the complaint alleged the following:

> On or around April 15, 1986, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed a c-section delivery of the baby of patient [H]. . . . There was an inappropriate delay in performing the c-section in light of evidence of fetal distress.

The evidence presented at the hearing did not support the allegation that there was an unnecessary delay in performing the c-section. The hearing officer also received evidence that Dr.Krueger breached the applicable standard of care by medicating the patient with sensorcaine and pitocin. Although Dr. Krueger did not object when the evidence was admitted, he did object to its consideration as a ground for discipline in his closing argument and brief. Nevertheless the board concluded that Dr. Krueger breached the standard of care by using sensorcaine and pitocin in patient H's case. It did not conclude that the care given patient H deviated from the appropriate standard in any other respect.

The Board's consideration of the unpleaded medication issue raises a due process issue. The Board's regulations provide that:

> Pleadings . . . shall set forth a clear and concise statement of the matters relied upon as a basis for such pleading, . . . IDAPA 22.G.8.c.
>
> . . . Formal complaints . . . shall set forth a short and plain statement of the ground of complaint and a statement of the facts or things done or omitted to be done by such persons. Facts constituting such act or omissions, . , should be stated, . . . IDAPA 22.G.8.f.

While a case may be decided on the basis of unpleaded issues, it only may be done with the express or implied consent of the parties. Otherwise the adverse party has no notice and opportunity to address the issue with evidence and argument. *M.K. Transport* v. *Grover,* 101 Idaho 345, 612 P.2d 1192 (1980). When evidence presented at trial has some relevance both to pleaded and unpleaded issues,

the trier of fact should not treat introduction of the evidence as manifestation of the opposing party's consent to a decision based on an unpleaded issue. *Dursteler* v. *Dursteler,* 108 Idaho 230, 697 P.2d 1244 (Ct. App. 1985). Furthermore, in Dr. Krueger's case, he specifically objected to consideration of unpleaded issues, albeit after the evidence was admitted. I conclude that consideration of the medication issue and making a decision based on the medication issue violated his constitutional right to due process.

The case will be remanded with direction to strike its conclusion that Dr. Krueger's management of the case of patient H did not meet the standard of care provided by other qualified physicians in the Boise community. The board also is directed to reconsider its decision to discipline Dr. Krueger in light of this ruling.

THE JURY VERDICT AGAINST PATIENT F

After the hearing but before the board reached a decision, a jury returned a verdict favorable to Dr. Krueger in an independent medical malpractice action brought by patient F. The board and its agents were not parties to the action and took no part in it. Although asked to do so by Dr. Krueger, the board refused to consider the verdict in reaching its disciplinary decision. Dr. Krueger argues that the board violated both the doctrine of collateral estoppel and his due process rights in not considering the verdict.

I.R.E. Rule 201 and I.C. §67-5210(4) provide for judicial notice of adjudicative facts. This includes public and private acts of the judiciary. I.C. § 9-101. Because something is judicially noticed, however, does not mean it is admissible. Before it may be admitted in evidence, it must be relevant, that is, it must have a tendency to make the existence of any fact that is of consequence to the determination of a case more probable or less probable than it would be without the evidence. Compare, I.R.E. Rules 401, 402.

The jury verdict in Case No. 91861 did not make any fact in issue in the disciplinary proceeding more likely or

less likely. It was not evidence of a disputed fact; rather it was the conclusion that twelve people reached after listening to evidence. The board was correct in not considering it as evidence.

While the jury verdict had no significance for evidentiary purposes, it arguably could have had some significance because consideration of convenience and finality require that the same claims not be relitigated between the same parties. *Aldape* v. *Akins,* 105 Idaho 254, 688 P.2d 130 (Ct. App. 1983). This is the fundamental reason for the doctrines of *res judicata* and collateral estoppel. A person who is not a party to an action, however, is not bound by or entitled to the benefits of claim preclusion or issue preclusion. *Restatement, Second, Judgments* §34. There are a number of instances in which claim preclusion and issue preclusion will be applied to non-parties, all of which involve either:

1. A judgment obtained in an in rem proceeding;
2. A judgment obtained in a quasi in rem proceeding;
3. A judgment determining the status or change of status of a person;
4. A judgment to which the non-party agreed to be bound; or
5. A judgment in which one or more of the parties to the proceeding bore a special relationship to the non-party making it appropriate that the non-party should have the benefit of the judgment or be bound by the judgment. See generally, *Restatement, Second, Judgments,* §§ 30-62.

The favorable judgment obtained in the malpractice litigation by Dr. Krueger does not come within the parameters of any of the situations in which a non-party may be bound by or protected by the outcome of prior litigation. Although Dr. Krueger argues to the contrary, there is nothing in the record to establish any relationship between the board and patient F. Consequently the board acted correctly in not giving the verdict in the malpractice case a

claim preclusion or an issue preclusion effect in the disciplinary proceeding.

The *Brown* case, cited by Dr. Krueger, is not applicable to the legal issues presented in the case before me. *Brown* v. *Idaho State Board of Pharmacy,* 113 Idaho 547, 746 P.2d 1006 (Ct. App. 1987). In *Brown,* which also was a professional disciplinary proceeding, a felony judgment of conviction was used against a pharmacist who participated as the defendant in the criminal case. The factual issue in the disciplinary proceeding was whether the pharmacist had been convicted of a felony. Obviously, the felony judgment itself had both evidentiary value and collateral estoppel value. In the ca e now under review, however, the verdict in the malpractice case has no evidentiary value and no preclusive effect against the board.

Dr. Krueger also argues that failure to consider the jury verdict denied him procedural due process. I believe that the foregoing analysis covers the due process argument.

FAILURE TO FOLLOW THE HEARING OFFICER'S RECOMMENDATIONS

Finally, Dr. Krueger argues that the board erred in failing to explain why its findings differed from those of the hearing officer. In view of the decision I have reached, I see no need to discuss the issue. Compare, however, *Department of Health and Welfare* v. *Sandoval,* 113 Idaho 186, 742 P.2d 992 (1987).

****

The captioned matter is remanded to the Board of Professional Discipline of the Idaho State Board of Medicine for further proceedings in accordance with the directions contained in the body of this opinion.

Dated this 27th day of February, 1991.

/s/ George D. Carey
George D. Carey
District Judge

IN THE

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF
PHILIP M. KRUEGER, M.D.
License No. M-3549

Case No. 93335

DECISION ON PETITIONS FOR REHEARING—Filed April 25, 1991

Appearances:
David Nye, counsel for plaintiff
Jean Uranga, counsel for defendant

HONORABLE GEORGE D. CAREY, District Judge

The captioned case is before the court on petitions by each party for rehearing or modification. The petitions for re-hearing are denied. Dr. Krueger's petition for modification is granted in part.

The case involves judicial review of the decision of the Board of Professional Discipline of the Idaho State Board of Medicine concerning Dr. Krueger's license to practice medicine, The board revoked his license but stayed the revocation on various conditions. On review I remanded the case to the board to reconsider of its decision.

The petitions involve my decision on the void-for-vagueness issue. Dr. Krueger argued that the disciplinary statute (I.C. §54-1814(7)) was void for vagueness on its face. I ruled that it was not void on its face. (Decision, pp. 13-15).

Dr. Krueger also argued that the statute was unconstitutionally vague as applied. Because the emphasis in both briefing and oral argument was on the "one-handed" surgeries (Patients B, C, D, and E), I analyzed the argument in the context of those cases. I concluded that before the board could reach a decision that Dr. Krueger violated the applicable local standard of care, there must be a standard of care that is "recognized by a consensus of expert opinion." *Reyburn* v. *Minnesota State Board of Optometry*, 78 N.W.2d 351, 355 (Minn. 1956), cited with approval in *Tuma* v. *Board of Nursing*, 100 Idaho 74, 593 P.2d 711 (1979). Since there was disputed evidence on the standard of care and since the board made no finding whether there was a consensus of expert opinion, I remanded the case to the board:

> . . . to prepare further findings concerning the consensus of expert opinion as it was developed through the evidence presented at trial and as it related to the surgeries performed on patient's B, C, D, and E. If after consideration, the board changes its ultimate conclusion with respect [to] these surgeries, then it also should reconsider the decision to discipline Dr. Krueger. (Decision, p. 16).

The board contends in its petition for rehearing that the "consensus" ruling incorrectly states the law. It has presented nothing that convinces me to modify my decision or re-hear arguments. The petition is denied.

Dr. Krueger's petition urges that I apply the consensus ruling to the cases of Patients A, F, and H.

I have carefully re-read the arguments presented in Dr. Krueger's opening and responding appellate briefs. I now note that in his opening brief he did argue that the vague-as-applied doctrine should be applied in the case of Patient A. The brief stated:

> . . . . He had no warning, by statute or by Board rules and regulations, that not using an internal monitoring device or immediately transporting a patient after detecting meconium in the patient's amniotic fluid would subject him to discipline. (Dr. Krueger's appellate brief, p. 22).

In the case of Patient A there was disputed evidence about the standard of care, and the board made no finding of a consensus of expert opinion concerning the standard of care. My order of remand, therefore, will be modified to reconsider findings with respect to Patient A.

In reviewing Dr. Krueger's appellate briefs and oral argument, I find no place in which he argued that there was a factual basis for applying the vague-as-applied doctrine to the case of Patient F. The closest he came to approaching the issue was the following argument presented in his reply brief:

> Dr. Krueger had no notice that declining to perform a cesarian section on Patient F after the baby began its descent down the birthing canal would subject him to discipline by the Board even though a jury ruled that his conduct did not constitute medical malpractice or a violation of local standard of care prior to the Hearing Officer's proposed decision and the Board's decision. (Dr. Krueger's reply brief, p. 5).

The board did not discipline Dr. Krueger for declining to perform a cesarian section. (Board findings, ¶ 17). I also note that the jury verdict issue was addressed in my decision at pages 19-21.

While a petition for rehearing or reconsideration is an appropriate method of inviting the court to revise its decision on the issues that were before it, it should not be used to inject an issue that was not raised in the course of the original appellate proceedings. The petition, as it applies to the case of Patient F, is denied.

In Patient H's case, I ruled on a different constitutional ground that the board must strike its conclusion that the management of her case did not meet the local standard of care. Consequently it is unnecessary to remand this case to the board for additional fact finding.

Dr. Krueger also argues that I should not remand the matter to the board, but that I should substitute my own findings of fact for those of the board. Such an approach to review of agency decisions has been rejected. Compare,

Van Orden v. *State*, 102 Idaho 663, 637 P.2d 1159 (1981). The request is denied.

ORDER MODIFYING DECISION ON PETITION FOR JUDICIAL REVIEW

It hereby is ordered that the court's Decision On Petition For Judicial Review is modified to strike the closing paragraph on page 22 and to substitute in its place the following language:

The captioned matter is remanded to the Board of Professional Discipline of the Idaho State Board of Medicine with the following instructions:

1. The board is directed to strike its conclusion that Dr. Krueger's management of the case of Patient H did not meet the standard of care provided by other qualified physicians in the Boise community. The board also is directed to reconsider its decision to discipline Dr. Krueger in light of this ruling.

2. The board is directed to prepare further findings of fact on the consensus of expert opinion, if any, concerning the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account Dr. Krueger's training, experience, and the degree of expertise to which he held himself out to the public, as that consensus of opinion was developed through the evidence presented at trial and as it related to the management by Dr. Krueger of the cases of Patients A, B, C, D, and E. If after due consideration, the board changes its ultimate conclusions with respect to any of these cases, then it also is directed to reconsider its decision to discipline Dr. Krueger.

Dated This 25th day of April, 1991.

/s/ George D. Carey
George D. Carey
District Judge

PHILIP M. KRUEGER, M.D.,
License No. M-3549, - - - *Petitioner-Respondent and Cross Appellant*

v.

BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE, - - - - - - *Respondent-Appellant and Cross Respondent*

No. 19323

Supreme Court of Idaho,
Boise, February 1992 Term.

July 8, 1992.

Rehearing Denied Sept. 30, 1992.

Board of professional discipline initiated proceedings against doctor for violating community standard of care during treatment of patients. From license revocation, stayed upon conditions, doctor appealed. The District Court, Ada County, G.D. Carey, J., sustained appeal in part and remanded. Board appealed and doctor cross-appealed. The Supreme Court, Reinhardt, J., pro tem., held that: (1) statute on local community standard of care, though not incorporating any consensus of expert opinion standard, was not unconstitutionally vague on it face or as applied; (2) deviation between certain allegations and proof violated doctor's right to procedural due process; and (3) prior jury verdict finding doctor not liable for same conduct for which board was disciplining doctor was not admissible in proceeding to prove doctor met standard of care as to patient.

Affirmed in part and reversed in part.

1. Physicians and Surgeons Key 2

Statute concerning local community standard of care, as applied in physician disciplinary proceedings to assess health care provided by physician, was not unconstitutionally vague on its face where language was similar to well-accepted statutory definition of medical malpractice and was codification of already existing case law. I.C. § 54-1814(7).

2. Physicians and Surgeons Key 2

Statute concerning local community standard of care, as applied in physician disciplinary proceedings to assess health care provided by physician, was not unconstitutionally vague as applied for lack of standard which was recognized by consensus of expert opinion, at least where board's decision was based upon extensive expert testimony by local physicians, doctor's fitness to practice medicine was called into question, and board was comprised of members from medical community whose expertise was born of personal knowledge and experience. I.C. § 54-1814(7).

3. Physicians and Surgeons Key 2

In view of similarity between physician disciplinary statute and accepted definition of medical malpractice, language of disciplinary statute is sufficient to notify medical practitioners that they can be disciplined for failure to conform to community standards. I.C. § 54-1814(7).

4. Constitutional Law Key 287.2(5)

Physicians and Surgeons Key 11.3(2)

Doctor's procedural due process rights to be notified of charges, to gather witnesses, and to prepare a defense were violated where board's complaint stated allegations of inappropriate delay in performing c-section in light of fetal distress but board was actually charging doctor with administering inappropriate medications which caused fetal distress; therefore, board's conclusions as to charges were properly stricken. U.S.C.A. Const.Amends. 5, 14.

5. Physicians and Surgeons Key 11.3(3)

Jury verdict finding doctor not liable for malpractice was not relevant to professional discipline board's determination whether doctor met local community standard of care; negative jury verdict could have indicated that doctor's alleged negligence was not proximate cause of injuries or could have indicated that patient failed to prove she suffered injuries.

6. Judgment Key 707

Jury verdict finding doctor not liable for malpractice was not entitled to any preclusive effect in physician discipline board's determinations as to whether doctor met local community standard of care because board was neither involved in independent malpractice action nor did it have special relationship which would make it appropriate to bind board by verdict.

Uranga, Uranga & Bieter, Boise, for respondent-appellant and cross respondent. Jean R. Uranga argued.

Merrill & Merrill, Chartered, Pocatello, for petitioner-respondent and cross appellant. David C. Nye argued.

REINHARDT, Judge pro tem.:

This is an appeal from a Decision on a Petition for Judicial Review of the decision of the Board of Professional Discipline of Idaho State Board of Medicine (hereafter "Board") concerning the license of Philip M. Krueger, M.D., to practice medicine. The Board appeals from the district court's decision remanding the case to the Board for further findings and conclusions as to patients A, B, C, D and E, and reversing the Board's decision as to patient H. Dr. Krueger cross-appeals, contending that the Board used unconstitutionally vague grounds for revoking his license, violated his constitutional right to due process, and erred in not considering a jury verdict exonerating him of malpractice in the physician-patient relationship with patient F.

On November 8, 1988, the Board initiated disciplinary proceedings against Dr. Krueger for violations of I.C. § 54-1814(7), which allows discipline of a physician based upon:

> The provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public.

At issue was Dr. Krueger's conduct as it related to eight patients (patients A-H), with alleged incidents of breach of the standard of care including the following:

Patient A: Failure to adequately monitor an infant's condition during the birthing process, and a lack of preparation in transferring the mother and the infant to a hospital once evidence of meconium aspiration was available.

Patients B, C, D and E: Performing elective surgeries while incapacitated by a writs injury which necessitated the surgeries be performed with one hand.

Patient F: Use of forceps during delivery without knowing the exact position of the infant's head.

Patient G: No violation of the standard of care was found.

Patient H: Delay in performing a C-section. The Board also found that Dr. Krueger used contraindicated medications. Whether or not Dr. Krueger had adequate notice that the Board was challenging his use of medication is one of the issues presented on appeal.

Following a five-day hearing in which extensive expert testimony was admitted on the subject of whether a violation of the standard of care had taken place, a designated hearing officer made a decision and report to the Board on November 30, 1989, with proposed findings of fact, conclusions of law and order.

On January 30, 1990, after conducting an independent review of the record and reviewing the recommendations of the hearing officer, the Board issued its findings of fact,

conclusions of law and final order. The Board found that Dr. Krueger had violated the community standard of care in his treatment of patients A, B, C, D, E, F and H. The Board's order revoked Dr. Krueger's license, but stayed revocation so long as Dr. Krueger complied with certain terms and conditions outlined by the Board. Dr. Krueger appealed that order to the district court.

On appeal, the district court remanded the case to the Board for further findings and conclusions of whether "a consensus of expert opinion" supported the Board's findings that Dr. Krueger had violated the community standard of care as to patients B, C, D and E. Furthermore, the court, upon finding that there was a variation between the allegations contained in the complaint and the evidence presented at the hearing, directed the Board to strike its conclusion that Dr. Krueger's management of the case of patient H did not meet the standard of care provided by other qualified physicians in the Boise community, and directed the Board to reconsider its decision to discipline Dr. Krueger. The district court also found that the jury verdict absolving Dr. Krueger of liability as to patient F had no evidentiary or preclusive effect, and that the Board was correct in refusing to consider that verdict. Both the Board and Dr. Krueger petitioned for a rehearing, which petitions were denied. The district court did, however, modify its original decision to require the Board to also reconsider its finding as to Patient A to determine whether there was a consensus of expert opinion that Dr. Krueger failed to meeting the community standard of care.

I.
UNCONSTITUTIONAL VAGUENESS ARGUMENT

Krueger argues that I.C. § 54-1814(7) is unconstitutionally vague on its face because it does not define what conduct constitutes a breach of the local community standard of care. As applied to professional disciplinary proceedings, the void for vagueness concept has been addressed

by this Court, which found a statute to be unconstitutionally vague.

> . . . when its language does not convey sufficiently definite warnings as to the proscribed conduct, and its language is such that men of common intelligence must necessarily guess at its meaning.

Wyckoff v. *Board of County Commrs. of Ada County,* 101 Idaho 12, 15, 607 P.2d 1066, 1069 (1980) (cited in *H & V Eng'g* v. *Board of Professional Engrs.,* 113 Idaho 646, 747 P.2d 55 (1987)).

[1] We agree with the district court's finding that this statute is not unconstitutionally vague on its face, even though the Board has not promulgated any regulations to further define or explain the statute. The language of the statute is similar to the well-accepted definition of medical malpractice contained in I.C. § 6-1012, and is merely a codification of already existing case law. *Bolen* v. *United States,* 727 F.Supp. 1346 (D.Idaho 1989); *LePelley* v. *Grefenson,* 101 Idaho 422, 614 P.2d 962 (1980); *Swanson* v. *Wasson,* 45 Idaho 309, 262 P. 147 (1927). The finding of the district court that I.C. § 54-1814(7) is not unconstitutionally vague on its face is therefore affirmed.

[2, 3] Dr Krueger also argued that the statute was vague as applied, relying on this Court's decision in *H & V Eng'g* v. *Board of Professional Engrs.,* 113 Idaho 646, 747 P.2d 55 (1987) and *Tuma* v. *Board of Nursing,* 100 Idaho 74, 593 P.2d 711 (1979). The district court held that to avoid a finding of vagueness as applied, *Tuma* and *H & V* required the Board to find from the evidence that the standard it adopted was one recognized by a "consensus of expert opinion."

In *Tuma,* a registered nurse sought review of an order of the Board of Nursing which suspended her license under I.C. § 54-1422(a)(7), for interfering with a doctor-patient relationship by discussing alternative treatment methods with a terminally ill cancer patient. The primary issue on her appeal was whether her due process rights were satisfied by a statute which authorized the suspension of her

professional license to practice nursing on the grounds of "unprofessional conduct" in the absence of statutes or regulations specifically defining the conduct which would be deemed unprofessional.

This Court recognized in *Tuma*, that the right to practice one's profession is a valuable property right and that a state cannot exclude a person from the practice of his profession without having provided the safeguards of due process. 100 Idaho at 77, 593 P.2d at 714 (citing *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), and *Ferguson* v. *Board of Trustees of Bonner County School Dist. No. 82*, 98 Idaho 359, 364, 564 P.2d 971, 976 (1977)). In *Tuma*, this Court applied a two-pronged test to the void for vagueness doctrine, noting that:

> Not only are those whose activities are proscribed entitled to definite standards by which they may be guided, but it is equally important that the standards are there to guide those officers or agencies required to pass judgment on licensees called to account for their conduct.

100 Idaho at 80, 593 P.2d at 717. We found that the statutory definitions of "unprofessional conduct" in question did not adequately warn Tuma of the possibility that her license would be suspended if she engaged in conversations with a patient regarding alternative procedure.

In *Tuma* and *H & V*, we held that the administrative boards could not rely merely on their own expertise, experience and collective knowledge, but must articulate clear standards which will warn the professional as to which acts are unlawful. We find the facts of this case distinguishable from those in *Tuma* and *H & V*. In both of those cases the respective boards did not rely on the testimony of expert witnesses with regard to the professional standards in question, and instead relied solely on the expertise of the members of the board. In this case extensive expert testimony by local physicians was presented from which the Board made its determination that Dr. Krueger's con-

duct did not meet the local standard of care. It should also be noted that in *Tuma* we recognized that there had been no allegation that Tuma was unfit to practice nursing (citing the California case of *Morrison* v. *State Bd. of Educ.*, 1 Cal.3d 214, 230-31, 82 Cal.Rptr. 175, 187-88, 461 P.2d 375, 387-88 (1969), in which a teacher's license revocation for unprofessional conduct was saved from a holding of vagueness by a judicial interpretation construing the statutory language to constitute a ban on conduct which would indicate an unfitness to teach). In the instant case the Board did call into question Dr. Krueger's fitness to practice medicine.

Tuma may be further distinguished in that it was not the Board of Nursing which found Tuma guilty of unprofessional conduct, but a hearing officer who "was not possessed of that expertise born of 'personal knowledge and experience' which would have enabled him, albeit after the fact, to determine whether Tuma had indeed acted unprofessionally." 100 Idaho at 81, 593 P.2d at 718. The Board of Nursing's only function was to approve or disapprove the decision of the hearing officer who had only a legal background. In this case the finding that Dr. Krueger had violated the community standard of care came directly from the Board of Professional Discipline of the Idaho State Board of Medicine, which was comprised of members of the medical community who did possess expertise born of personal knowledge and experience. The utilization of this experience, technical competence, and specialized knowledge in the evaluation of evidence is specifically permitted by I.C. § 67-5210(4).

The hearing officer and the district court both relied on this Court's holdings in *Tuma* and *H & V* to support a requirement of a "consensus of expert opinion." We believe, however, that the district court's reliance on the consensus language from the *Tuma* opinion was misplaced. In *Tuma*, this Court was addressing the authority which was conferred upon a board to promulgate rules and regulations further defining unprofessional conduct when it quoted the

"consensus" language from *Reyburn* v. *Minnesota State Bd. of Optometry,* 247 Minn. 520, 78 N.W.2d 351 (1956). *Reyburn* was cited for the proposition that in promulgating rules, a board could "declare as 'unprofessional' *only* such conduct as fails to conform to those standards of professional behavior which are recognized by a consensus of expert opinion as necessary of the public's protection." (Emphasis in original). 100 Idaho at 78, 593, P.2d at 715. *Reyburn* goes on to say that ". . . the antecedent adoption by the board of rules and regulations defining what constitutes 'unprofessional conduct' is not a prerequisite to the suspension or revocation of a practitioner's license of 'unprofessional conduct.' *Bell* v. *Board of Regents,* 295 N.Y. 101, 65 N.E.2d 184, 163 A.L.R. 900, with Annotation at page 909." 78 N.W.2d at 357. *Reyburn* did not hold that a board was prohibited from disciplining a person for "unprofessional conduct" unless it first found that the conduct was considered inappropriate by a consensus of expert opinion. It should also be noted that the *Reyburn* court held the statute in question was not unconstitutionally vague:

> Since "unprofessional conduct" is of itself, without amplification, a sufficiently definite ground upon which the board may revoke or suspend a license, it cannot reasonably be maintained that such a statutory provision becomes invalid simply because the legislature has expressly defined certain acts as unprofessional conduct but has left it to the board to determine what additional and other acts and omissions are "unprofessional." It would be unreasonable to hold that, when the legislature prescribes only the basic standard of "unprofessional conduct," the statute is sufficiently definite to be valid but that it is invalid when the legislature attempts a partial enumeration of what constitutes such conduct. The statutory phrase "among other things" coupled to the enumeration of specific or illustrative acts of unprofessional conduct in indicative merely of a legislative intent not to occupy the entire field by express definition but to delegate to the board the duty of ascertaining what other or additional acts violate the profession's acceptable standards.

78 N.W.2d at 356.

In *Tuma* we cited *Ward* v. *Oregon State Bd. of Nursing*, 266 Or. 128, 510 P.2d 554 (1973), for the proposition that "one of the characteristics of a profession is its responsibility to formulate standards of conduct for its members." 266 Or. at 134, 510 P.2d at 557. While it is not disputed that the Board in this case has the power to promulgate rules and regulations, we also note that the *Ward* court stated, "It is to be expected that the legislature would intend to vest in a board made up of members of the profession a certain amount of leeway in applying those standards in disciplinary proceedings." 510 P.2d at 557.

We are convinced that Dr. Krueger did have adequate notice of the conduct which could subject him to discipline. The statute in question here is distinguishable from the "unprofessional conduct" statute in *Tuma* and the "misconduct" statute in *H & V*, in that it merely codified well-established concepts of medical malpractice. In view of the similarity between the disciplinary statute and the accepted definition of medical malpractice, we believe the language of I.C. § 54-1814(7) was sufficient to notify medical practitioners that they could be disciplined for failure to conform to the community standards. We therefore reverse the district court's finding that the Board's decision as to patients A through E would be unconstitutionally vague in the absence of a finding that the decision was supported by a consensus of expert opinion. We also reverse the order of the district court remanding to the Board the decisions as to patients A through E.

II.
PROCEDURAL DUE PROCESS ARGUMENT

With regard to the treatment of patient H, the Board found clear and convincing evidence that the use of sensorcaine was contraindicated, that Dr. Krueger's use of pitocin was inappropriate, and that his management of the delivery of patient H did not meet the standard of care provided by other qualified physicians in the Boise community.

The Board appeals the district court's holding which overturned the Board's decision regarding patient H, based upon inadequate notice of charges. The Board argues that Dr. Krueger was fully apprised by the complaint that his handling of the delivery of patient H was in dispute, and notes that Krueger presented a defense to the allegations that his use of the medicines was contraindicated. Krueger maintains that the complaint only provided notice that there was alleged to have been a delay in performance of the C-section, and that because of lack of notice he was unable to adequately respond to the charges that he had inappropriately administered the medications.

[4] We agree with the district court's finding that there was a deviation between the allegations and the proof as to patient H which violated Dr. Krueger's constitutional right to procedural due process. The complaint alleged that:

> On or around April 15, 1986, at St. Alphonsus Regional Medical Center in Boise, Idaho, Respondent performed a c-section delivery of the baby of patient [H] . . . There was an inappropriate delay in performing the c-section in light of evidence of fetal distress.

Under the Idaho Administrative Procedures Act, the Board was required to set forth a short and plain statement of the ground of complaint and a statement of the facts or things done or omitted to be done. IDAPA 22.G.8.f. We find that the complaint as to patient H failed to adequately notify Dr. Krueger that the Board was charging him with administering inappropriate medication which caused the fetal distress, and that he lacked a fair opportunity to gather witnesses and prepare a defense. We therefore affirm the district court's direction to strike the Board's conclusion that Dr. Krueger's management of the case of patient H did not meet the standard of care provided by other qualified physicians in the Boise community.

III.
ADMISSIBILITY OF JURY VERDICT

Two weeks prior to the hearing officer's submission of his proposed decision to the Board, a jury in an independent action concluded that Dr. Krueger was not liable for malpractice in his care of patient F. Krueger moved the Board to receive evidence regarding that jury verdict and to consider the verdict in its evaluation of Dr. Krueger's conduct as to patient F. The Board denied the motion, and the district court held that the Board acted correctly in not considering the verdict as evidence or giving the verdict any preclusive effect in the disciplinary proceeding.

Krueger cited *Brown* v. *Idaho State Board of Pharmacy*, 113 Idaho 547, 746 P.2d 1006 (Ct.App.1987), for the proposition that a judicial judgment is, under I.C. § 67-5210, admissible in an administrative proceeding. In *Brown*, an administrative disciplinary action was brought against a pharmacist who had entered a guilty plea to a criminal charge of possession of drug paraphernalia. That criminal conviction was the *basis* of the disciplinary proceeding under I.C. § 54-1726(1)(c), which provided that the conviction of a felony or any violation of a state drug law is sufficient grounds for discipline and thus is distinguishable on its facts.

[5, 6] Krueger maintains the jury concluded that he had met the local community standard of care as to patient F and that the verdict was a judicially cognizable fact which the Board should have considered. While the verdict was favorable to Dr. Krueger, it is unclear whether the jury felt he had not violated the standard of care. The question which the jury answered negatively asked: "Was the defendant, Philip M. Krueger, negligent, which negligence was a proximate cause of the plaintiff's [name omitted] injuries?" The negative answer could have indicated that the plaintiff had failed to prove that she suffered injuries or that the jury believed the negligence of Krueger was not the proximate cause of the injuries. The verdict was not relevant under I.R.E. 401 as it did not have a tendency to

make the existence of any fact that was of consequence to that proceeding more probable or less probable. We also agree that the jury verdict is not entitled to any preclusive effect, for the reason that the Board was neither involved in the independent malpractice action nor had a special relationship which would make it appropriate to bind them by the verdict. We therefore affirm the district court's finding that the Board was correct in refusing to consider the verdict.

We reverse the district court's order remanding the decisions as to patients A, B, C, D and E. We affirm the district court's findings as to patients F and H.

Because we find that the Board did not act without a reasonable basis in fact or law, no attorney fees will be granted under I.C. § 12-117.

BISTLINE and JOHNSON, JJ., and SCHILLING and TROUT, JJ. pro tem., concur.

IN THE

SUPREME COURT OF THE STATE OF IDAHO

PHILIP M. KRUEGER, M.D.,
License No. M-3549, - - *Petitioner-Respondent-Cross Appellant,*

v.

BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE, - - - - - - *Respondent-Appellant-Cross Respondent.*

No. 19323

Reh. No. 92RH-33

ORDER DENYING PETITION FOR REHEARING

The Respondent-Cross Appellant having filed a PETITION FOR HEARING on July 29, 1992, and supporting BRIEF on August 12, 1992, of the Court's Opinion released July 8, 1992; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent-Cross Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

Dated this 30th day of September, 1992.

By Order of the Supreme Court
/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge George D. Carey

Supreme Court, U.S.
FILED
JAN 26 1993
OFFICE OF THE CLERK

No. 92-1115

In The

Supreme Court of the United States

October Term, 1992

PHILIP M. KRUEGER, M.D.,

Petitioner,

versus

BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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January 26, 1993

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TABLE OF CONTENTS

Page

Opinions Below 1

Statement of the Case 2

Argument 3

I. The Petition for Writ of Certiorari should be denied for the reason that the issues raised by Petitioner do not justify the granting of a Writ of Certiorari 3

II. Idaho Code Section 54-1814(7) is not unconstitutionally vague on its face in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution 4

III. Idaho Code Section 54-1814(7) is not unconstitutionally vague as applied to Petitioner in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution 11

IV. The Board's refusal to consider the medical malpractice jury verdict exonerating the Petitioner for his treatment of Patient F did not violate Petitioner's right to procedural Due Process under the Fifth and Fourteenth Amendments to the United States Constitution 13

Conclusion 16

TABLE OF AUTHORITIES

Page

CASES:

Andre v. Morrow, 106 Idaho 455, 680 P.2d 1355 (1984) 15

Baggett v. Bullitt, 377 U.S. 360 (1964) 5

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978) 4

Barsky v. Board of Regents, 347 U.S. 442 (1954) 4, 6

Board of Dental Examiners v. Brown, 448 A.2d 881 (Me. 1982) 10

Bigelow v. Virginia, 421 U.S. 809 (1975) 6

Bolen v. United States, 727 F.Supp. 1346 (D.Idaho 1989) 6

Brinkley v. Hassig, 130 Kan. 874, 289 P. 64 (1930), *appeal dismissed*, 282 U.S. 800 (1930) 9

Carey v. Quern, 588 F.2d 230 (7th Cir. 1978) 12

Chastek v. Anderson, 416 N.E.2d 247 (Ill. 1981) 10

Connally v. General Construction Co., 269 U.S. 385 (1926) 5

Czarra v. Board of Medical Supervisors, 25 App. D.C. 443 (1905) 6, 7

Dent v. West Virginia, 129 U.S. 114 (1889) 4, 6

Graves v. State of Minnesota, 272 U.S. 425 (1926) 6

Hicks v. Miranda, 422 U.S. 332 (1975) 4

Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968) 12

TABLE OF AUTHORITIES – Continued

Page

Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964)..... 12

Jensen v. Administrator of Federal Aviation Administration, 641 F.2d 797 (9th Cir. 1981), *vacated* 680 F.2d 593 (9th Cir. 1982)..... 12

Kauffman v. Department of Commerce, Board of Medical Examiners, 746 P.2d 103 (Mont. 1987) 9

Ladrey v. Commission on Licensure to Practice the Healing Art in the District of Columbia, 261 F.2d 68 (1958), *cert. den.* 358 U.S. 920 (1958) 7

Lanzetta v. New Jersey, 306 U.S. 451 (1939)..... 5

Leazer v. Kiefer, 120 Idaho 902, 821 P.2d 957 (1991) 6

Lehman v. State Board of Public Accountancy, 263 U.S. 394 (1923) 7, 8

LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980) 6

Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928), *overruled by North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) 4

Martinez v. Texas State Board of Medical Examiners, 476 S.W.2d 400 (Tex. Cir. App. 1972), *appeal dismissed*, 409 U.S. 1020 (1972)..... 9

Meffert v. The State Board of Medical Registration and Examination, 66 Kan. 710, 72 P. 247 (1903), *judgment affirmed*, 195 U.S. 625 (1904) 9

Moreland v. Ambach, 489 N.Y.S.2d 403, 111 A.D.2d 533 (1985)..... 10

TABLE OF AUTHORITIES – Continued

Page

North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 4

Rosi v. State Medical Board, 665 P.2d 28 (Alaska 1983), *cert. denied by Storrs v. State Medical Board*, 464 U.S. 937 (1983) 10

Schware v. Board of Bar Exam. of State of N.M., 353 U.S. 232 (1957) 4

Swanson v. Wasson, 45 Idaho 309, 262 P. 147 (1927) 6

Wale v. Barnes, 278 So.2d 601 (Fla. 1973) 9

White v. Roughton, 530 F.2d 750 (7th Cir. 1976) 12

Yoshizawa v. Hewitt, 52 F.2d 411 (9th Cir. 1931) 8

STATE STATUTES:

Idaho Code § 6-1012 6

Idaho Code § 54-1814 ..... 2, 13

Idaho Code § 54-1814(7) ..... *passim*

Idaho Code § 67-5210(4) 15

Idaho Medical Practice Act, Title 54, Chapter 18, Idaho Code 2

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Rule 10.1 3

Rule 10.1(a) and (b) 3

Rule 16.1 4

TABLE OF AUTHORITIES – Continued

Page

RULES OF EVIDENCE:

Rule 201, I.R.E. 15

Rule 201, Federal Rules of Evidence 16

CONSTITUTION OF THE UNITED STATES:

Fifth Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

No. 92-1115

In The

Supreme Court of the United States

October Term, 1992

PHILIP M. KRUEGER, M.D.,

Petitioner,

versus

BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

The Respondent, BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE, respectfully prays that the Petition for Writ of Certiorari filed by Petitioner to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decisions delivered in the proceedings below.

STATEMENT OF THE CASE

The Idaho Medical Practice Act, Title 54, Chapter 18, Idaho Code, authorizes the Idaho State Board of Medicine, hereinafter referred to as the Board, to regulate physicians practicing within the State of Idaho. Idaho Code § 54-1814 allows the Board to take disciplinary action against a physician for several reasons, including:

> (7) The provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same community or similar communities, taking into account his training, experience and the degree of expertise to which he holds himself out to the public.

As will be discussed, this statutory provision allows disciplinary action based upon "medical malpractice".

Dr. Krueger is a Board certified obstetrician-gynecologist who has practiced in Idaho since 1976. The Board filed a Complaint against Petitioner on November 8, 1988, alleging violations of Idaho Code § 54-1814(7) with respect to nine patients in two years. The allegations against Petitioner are quoted in his Petition at pages 6 and 7.

Following pretrial proceedings and extensive discovery, including numerous depositions, a four-day adjudicatory hearing was held before a hearing officer. Twenty-five witnesses, including eighteen physicians, testified and sixty-six exhibits were admitted.

The Board concluded that Petitioner had engaged in malpractice with respect to seven patients.

At pages 8 through 12 of his Petition, Petitioner attempts to challenge the Board's findings of fact. These challenges should be disregarded for the reason that there was conflicting evidence and conflicts in evidence must be left to the *trier of facts. Further, Petitioner never challenged the Board's* factual findings in his state appeal. The issues in the state court appeals were restricted to constitutional and procedural challenges. (The Board's findings with respect to Patient H were overturned by the Idaho Supreme Court on appeal on procedural grounds.)

At page 14, Petitioner argues that the Board imposed "stringent conditions" in its Order. In fact, the conditions were merely that Petitioner could not perform surgery while impaired physically or mentally, could perform obstetrics only in an accredited hospital, and must obtain consultation on all high risk pregnancies. (Appendix, p. 24a.)

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE ISSUES RAISED BY PETITIONER DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI.

Pursuant to Rule 10.1 of the Rules of the United States Supreme Court, a petition for a writ of certiorari should be granted only when there are special and important reasons. None of the cases cited by Petitioner would support review of the decision of the Idaho Supreme Court upon the grounds set forth in Rule 10.1.(a) and (b) of the Rules of the United States Supreme Court. As will be discussed, the Idaho Supreme Court decision in this

case is consistent with decisions of the United States Supreme Court and other state courts.

In sum, the issues raised by Petitioner are not of such significance or import as to require review by the United States Supreme Court. Consequently, Respondent respectfully requests that the Petition be denied. In the alternative, Respondent requests this Honorable Court to issue a summary affirmance or a dismissal for want of a substantial federal question. Rule 16.1, Rules of the United States Supreme Court; *Hicks v. Miranda*, 422 U.S. 332 (1975).

II

IDAHO CODE § 54-1814(7) IS NOT UNCONSTITUTIONALLY VAGUE ON ITS FACE IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent acknowledges that the pursuit of a lawful profession is a valuable property right subject to the protections of the due process clause of the Fourteenth Amendment to the United States Constitution. *Dent v. West Virginia*, 129 U.S. 114 (1889); *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232 (1957). The case of *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), cited by Petitioner did not even consider the due process clauses of either the Fifth and Fourteenth Amendments as Petitioner contends at page 16. Further, none of the other cases cited by Petitioner in his Petition ever considered the due process clause of the *Fifth* Amendment. The case of *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928), cited by Petitioner was overruled by the case of *North*

Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

The sole issues raised on this Petition for Writ of Certiorari are challenges that the applicable statutory language is void for vagueness and the jury verdict should have been considered. Petitioner does not allege any other due process violations with respect to the procedures utilized by the Board in providing Petitioner with adequate notice of the claims against him and an opportunity to be heard on those claims.

A statute may violate the due process clause of the Fourteenth Amendment if its terms are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

Petitioner argues that Idaho Code § 54-1814(7) is unconstitutionally vague on its face because there are no administrative rules specifically listing what acts fall within this statutory prohibition. Petitioner's argument fails to note that Idaho Code § 54-1814(7) merely codifies the well established definition of "medical malpractice" in Idaho statutes and case law.

The Idaho Supreme Court stated:

> We agree with the district court's finding that this statute is not unconstitutionally vague on its face, even though the Board has not promulgated any regulations to further define or explain the statute. The language of the statute

> is similar to the well-accepted definition of medical malpractice contained in I.C. § 6-1012, and is merely a codification of already existing case law. *Bolen v. United States*, 727 F.Supp. 1346 (D.Idaho 1989); *LePelley v. Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980); *Swanson v. Wasson*, 45 Idaho 309, 262 P. 147 (1927).

(Appendix, p. 50a.) Idaho Code § 6-1012 provides that, in a malpractice action for damages, one must prove that the physician or health care provider " . . . negligently failed to meet the applicable standard of health care practice of the community. . . . "

In the case of *LePelley v. Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980), the Idaho Supreme Court upheld the constitutionality of the comparable statutory language. 101 Idaho at 425. See also, *Leazer v. Kiefer*, 120 Idaho 902, 821 P.2d 957 (1991). Idaho Code § 54-1814(7) merely incorporates these same long-standing definitions of medical malpractice and does convey sufficient warnings of proscribed conduct to withstand any vagueness challenge.

It is well settled that a state has broad power to establish and enforce standards of professional conduct for physicians and that the state's power extends beyond initial licensing and includes continuing supervision. *Barsky v. Board of Regents*, 347 U.S. 442 (1954). The state has a legitimate interest in regulating the quality of medical care provided within its borders. *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Graves v. State of Minnesota*, 272 U.S. 425 (1926); *Dent v. West Virginia*, 129 U.S. 114 (1889).

Petitioner cites the case of *Czarra v. Board of Medical Supervisors*, 25 App. D.C. 443 (1905) for the proposition that a statute authorizing revocation of a physician's

license for "unprofessional or dishonorable conduct" is void for vagueness. In that case, the District of Columbia court did conclude that the statute was void on its face, but ruled:

> "Unprofessional or dishonorable conduct," for which the statute authorizes the revocation of a license that has been regularly obtained, is not defined by the common law, and the words have no common or generally accepted signification . . .

25 App. D.C. at 451. Idaho Code § 54-1814(7) does not suffer from the same criticism.

Further, the ruling in *Czarra* has been eroded by the more recent case of *Ladrey v. Commission on Licensure to Practice the Healing Art in the District of Columbia*, 261 F.2d 68 (1958), *cert. den.* 358 U.S. 920 (1958), which involved an action to revoke a physician's license on the grounds of "misconduct". The physician had used drugs or instruments with the intent to cause a miscarriage. The physician argued that the statutory term "misconduct" was unconstitutionally vague. The Court of Appeals for the District of Columbia determined that the statute was not unconstitutionally vague because revocation proceedings were conducted by the court with full opportunity for proof of misconduct as a matter of fact. The court noted: "Nor can we doubt that every medical practitioner knows fully that the performance of a criminal abortion is misconduct." 261 F.2d at 71.

Various decisions of the United States Supreme Court support a finding that Idaho Code § 54-1814(7) is not unconstitutionally vague. In the case of *Lehman v. State Board of Public Accountancy*, 263 U.S. 394 (1923), an

accountant sought to enjoin disciplinary action against him. The United States Supreme Court ruled that a statute authorizing the cancellation of an accountant's certificate "for any unprofessional conduct of the holder of such certificate, or for other sufficient cause" was not unconstitutional and did not deprive the accountant of property without due process of law. The Court noted that the board had never adopted any code or promulgated any rules defining what is or is not unprofessional conduct. The United States Supreme Court stated:

> Plaintiff in error puts some stress upon the absence of rules by the board, urging that the statute is in conflict with the Constitution of the United States, because it purports to authorize the revocation of a certificate "without defining or determining in advance what grounds or facts or acts shall be sufficient cause for such revocation." Such absence permits, it is asserted, arbitrary action. We cannot yield to that assertion or assume that the board will be impelled to action by other than a sense of duty or render judgment, except upon convincing evidence introduced in a regular way with opportunity of rebuttal.

263 U.S. at 398.

The *Lehman* case was quoted in the case of *Yoshizawa v. Hewitt*, 52 F.2d 411 (9th Cir. 1931). The Ninth Circuit considered a physician's challenge to the constitutionality of a Hawaii statute authorizing revocation of a physician's license on grounds of "gross carelessness and manifest incapacity." The Ninth Circuit noted that "gross carelessness" is synonymous with "gross negligence," which has a well established meaning based upon prior

case law. As a result, the terms "gross carelessness" were not unconstitutionally vague.

Similar results have been approved by the United States Supreme Court in the following cases: *Meffert v. The State Board of Medical Registration and Examination*, 66 Kan. 710, 72 P. 247 (1903), *judgment affirmed*, 195 U.S. 625 (1904) (revocation of a physician's license upheld on grounds of "gross immorality"); *Brinkley v. Hassig*, 130 Kan. 874, 289 P. 64 (1930), appeal dismissed for want of a substantial federal question, 282 U.S. 800 (1930) (revocation action based on "gross immorality" and "unprofessional conduct").

In the case of *Martinez v. Texas State Board of Medical Examiners*, 476 S.W.2d 400 (Tex. Cir. App. 1972), the Texas Court of Civil Appeals considered a Texas statute which allowed disciplinary action against a physician for "grossly unprofessional or dishonorable conduct, or [sic] a character which in the opinion of the Board is likely to deceive or defraud the public." 476 S.W.2d at 403, note 1. The Texas court ruled that the statute was not unconstitutionally vague. On appeal to the United States Supreme Court, the case was dismissed for want of a substantial federal question. *Martinez v. Texas State Board of Medical Examiners*, 409 U.S. 1020 (1972).

In addition, various state cases establish that Petitioner's actions violated accepted standards of health care. *Kauffman v. Department of Commerce, Board of Medical Examiners*, 746 P.2d 103 (Mont. 1987) (revocation of a physician's license for gross malpractice); *Wale v. Barnes*, 278 So.2d 601 (Fla. 1973) (a civil action was brought for

damages caused by a misapplication of forceps); *Chastek v. Anderson*, 416 N.E.2d 247 (Ill. 1981) (disciplinary action against a dentist based upon three counts of improper and unprofessional treatment); *Board of Dental Examiners v. Brown*, 448 A.2d 881 (Me. 1982) (revocation of a dentist's license based upon alleged incompetence and unskillfulness); *Moreland v. Ambach*, 489 N.Y.S.2d 403, 111 A.D.2d 533 (1985) (revocation of a physician's license based on five counts of gross negligence and incompetence); *Rosi v. State Medical Board*, 665 P.2d 28 (Alaska 1983), *cert. denied by Storrs v. State Board Medical Board*, 464 U.S. 937 (1983) (discipline of a physician on the statutory ground of "professional incompetence").

In sum, Idaho Code § 54-1814(7) is not unconstitutionally vague under controlling precedent of this Court and the Supreme Courts of various states. It clearly advises physicians that if they engage in malpractice they may be subject to discipline. However, Petitioner argues that the Board must go one step further and prepare voluminous administrative rules telling a physician what decision to make in every instance of treatment in order to avoid committing malpractice. Such a requirement is not only inconceivable, it is impossible, particularly when one considers there are numerous medical specialties, thousands of medications and millions of patients with different symptoms.

Contrary to Petitioner's argument at page 32 of his Petition, the issue of whether Petitioner violated the community standard of care was not sharply disputed. Petitioner presented no local or Idaho ob-gyns to testify in his support. Further, the only ob-gyn he called did not support him on one-hand surgery. While there were some conflicts in the evidence, it is the role of the trier of fact to

review the evidence and make decisions based on the evidence.

In sum, Idaho Code § 54-1814(7) is not unconstitutionally vague on its face.

III

IDAHO CODE § 54-1814(7) IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO PETITIONER IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

With respect to this issue, the Idaho Supreme Court noted that an administrative board may not merely rely on their own expertise, experience and collective knowledge in making decisions. However, the Idaho Supreme Court noted that, in this case, the Board had extensive expert witness testimony regarding the professional standards in question from which the Board made its determination that Petitioner's conduct did not meet the local standard of care. (Appendix, p. 52a.) The Idaho Supreme Court concluded:

> In view of the similarity between the disciplinary statute and the accepted definition of medical malpractice, we believe the language of I.C. § 54-1814(7) was sufficient to notify medical practitioners that they could be disciplined for failure to conform to the community standards. (Appendix, p. 54a.)

In support of his argument, Petitioner cites various federal cases which prohibit use of individualized administrative disciplinary actions. However, each of those cases are distinguishable and are not dispositive. In the

case of *Jensen v. Administrator of Federal Aviation Administration*, 641 F.2d 797 (9th Cir. 1981), the Ninth Circuit ruled that an administrative FAA regulation was invalid because it was in direct conflict with a federal statute. The quotation cited by Petitioner is merely dicta and deals with a situation entirely different than that involved in this case. The cited decision was later vacated. See, *Jensen v. Administrator of Federal Aviation Administration*, 680 F.2d 593 (9th Cir. 1982).

The case of *White v. Roughton*, 530 F.2d 750 (7th Cir. 1976), dealt only with eligibility for public assistance, not professional licensing issues. In that case, the Seventh Circuit Court of Appeals noted that eligibility was determined based solely on the unwritten personal standards of each individual staff member. That is, there was a total lack of any written standards. Again, this case is not at all comparable to the current case.

Two of the other three cases cited by Petitioner at page 21 are subject to the same criticisms. That is, the *Carey* and *Holmes* cases dealt solely with eligibility for public assistance in situations where there were absolutely no standards.

The case of *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), does not hold that "due process requires adoption of reasonable rules and regulations establishing standards for granting or denying liquor licenses" as Petitioner contends. Rather, the case involved a civil rights action and a request for declaratory judgment based upon the claim that Mrs. Hornsby was denied a liquor license

"without a reason therefor." The court held that the applicant had a right to know the applicable regulatory standards.

Contrary to Petitioner's contention, the Board did not engage in "ad hoc" rule-making or subjective interpretation of Idaho Code § 54-1814(7) at Petitioner's expense. The Board's decision was based upon the fact that Idaho Code § 54-1814(7) sets forth a well-established definition of "medical malpractice" and upon substantial, although conflicting, expert testimony regarding the community standard of care.

As can be seen from Respondent's Statement of Facts, Petitioner incorrectly argues at page 22 of his Petition that one-hand surgeries had previously been approved and accepted as standard practice in Boise. That claim is not supported by the evidence.

In sum, Idaho Code § 54-18141 is not unconstitutionally vague as applied to Petitioner.

IV

THE BOARD'S REFUSAL TO CONSIDER THE MEDICAL MALPRACTICE JURY VERDICT REGARDING PATIENT F DID NOT VIOLATE PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner next argues, beginning at page 24 of his Petition, that the Board violated his procedural due process rights by failing to receive into evidence and consider the jury verdict rendered in a civil case involving Patient F. Petitioner's Motion to the Board was filed two months after the jury verdict and one day before the scheduled Board meeting.

On this issue, the Idaho Supreme Court stated:

> Krueger maintains the jury concluded that he had met the local community standard of care as to patient F and that the verdict was a judicially cognizable fact which the Board should have considered. While the verdict was favorable to Dr. Krueger, it is unclear whether the jury felt he had not violated the standard of care. The question which the jury answered negatively asked: "Was the defendant, Philip M. Krueger, negligent, which negligence was a proximate cause of the plaintiff's [name omitted] injuries?" The negative answer could have indicated that the plaintiff had failed to prove that she suffered injuries or that the jury believed the negligence of Krueger was not the proximate cause of the injuries. The verdict was not relevant under I.R.E. 401 as it did not have a tendency to make the existence of any fact that was of consequence to that proceeding more probable or less probable. We also agree that the jury verdict is not entitled to any preclusive effect, for the reason that the Board was neither involved in the independent malpractice action nor had a special relationship which would make it appropriate to bind them by the verdict. We therefore affirm the district court's finding that the Board was correct in refusing to consider the verdict.

(Appendix, pp. 56a and 57a.)

Even if the jury had addressed the issue directly, its decision was not admissible in the Board action. The Board action is an administrative proceeding, whereas the other was a civil trial. The Board was not a party to that civil action and consequently, had no control over or

knowledge regarding the evidence which was actually presented at that civil trial. The evidence that was offered in the Board's action may be entirely different from that which was offered in the civil action. Further, it is the Board's statutory duty, using its medical expertise, to make decisions on the evidence and record before it, not to make a decision based upon unknown evidence presented to a jury of lay persons in an unrelated action. To allow an unrelated jury verdict to control the Board's statutory duty would be an improper delegation of the Board's statutory functions.

Under the principle of res judicata or claim preclusion, a judgment on the merits in a prior proceeding can act as a bar in a subsequent proceeding *only* if the same parties are involved and the same cause of action is involved. *Andre v. Morrow*, 106 Idaho 455, 680 P.2d 1355 (1984). In this case, the Board staff was not a party to the jury action and the causes of action are totally unrelated.

Petitioner argues that the jury verdict must not only be admitted, but must be accepted without question based upon Idaho Code § 67-5210(4) which provides: "notice may be taken of judicially cognizable facts." Idaho Code § 67-5210(4) merely states a rule comparable to the Rules of Evidence on judicial notice. Rule 201, I.R.E., defines judicial notice as follows:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

See also, Federal Rules of Evidence, Rule 201. Whether a jury verdict was right or wrong is certainly subject to reasonable dispute. It is also a fact not generally known and whose accuracy can reasonably be questioned. Judicial notice of a jury verdict in an unrelated civil case is not appropriate.

The Idaho Supreme Court was correct in affirming the Board's decision to deny Respondent's request to consider the jury verdict.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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